Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1181

RICHARD A. BATTERTON, ETC., ET AL.,
Petitioners,

v.

ROBERT FRANCIS, ETC., ET AL.,
Respondents.

RICHARD A. BATTERTON, ETC., ET AL.,
Petitioners,

v.

BARRY BETHEA, ETC., ET AL.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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The Petitioner, Richard A. Batterton, Secretary, Maryland Department of Human Resources (formerly Department of Employment and Social Services), prays that a writ of certiorari issue to review the per curiam opinion and judgment of the United States Court of

Appeals for the Fourth Circuit entered in these two proceedings on September 22, 1975.

OPINIONS BELOW

The per curiam opinion of the Court of Appeals for the Fourth Circuit, not yet reported, appears in the Joint Appendix filed with the petition (A. 100a). The opinions of the United States District Court for the District of Maryland that resulted in the appeal to the Court of Appeals, were entered on June 25, 1974, in *Francis v. Batterton,* 379 F. Supp. 78 (hereafter *Francis-II)* (A. 79a) and November 27, 1974, in *Bethea v. Mason,* 384 F. Supp. 1274 (hereafter *Bethea)* (A. 86a). The appeal to the Court of Appeals was consolidated with the appeal in a companion case, entitled *Francis v. The Chamber of Commerce of the United States of America.* That appeal was decided by the Court of Appeals in the same per curiam opinion and a petition for certiorari is also being filed in that case, No.

This Court, by its order of November 20, 1975, upon application of counsel for the Petitioner herein, extended the time for filing a petition for writ of certiorari in this matter to and including February 19, 1976 (A. 104a).

JURISDICTION

The judgment of the Court of Appeals was entered on September 22, 1975. This petition for certiorari is being filed within the extended period permitted by the Order of this Court of November 20, 1975, hereinabove noted. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

QUESTION PRESENTED

Does 45 C.F.R. 233.100(a)(1), as amended, violate the provisions of 42 U.S.C. 607(a), which authorizes the United States Department of Health, Education, and Welfare (HEW) to prescribe standards for the determination of unemployment in the AFDC-UF program.

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The challenged Maryland regulation held invalid below, MARR 7.02.09 Sec. 10.A(2) (formerly Rule 200X.A.2), provides as follows:

> A grant may not be paid from GPA-E or AFDC-E:
>
> * * * * * *
>
> 2. To meet need due to being disqualified for unemployment insurance.

The HEW regulation, 45 C.F.R. 233.100(a)(1), also held invalid below, provides in pertinent part:

> If a State wishes to provide AFDC for children of unemployed fathers, the State plan under Title IV — Part A of the Social Security Act must . . . [exceptions not relevant here]:
>
> (1) Include a definition of a unemployed father . . . . Such definition must include any father who:
>
> (i) Is employed less than 100 hours a month; or
>
> (ii) Exceeds that standard for a particular month, if his work is intermittent and the excess is of a temporary nature as evidenced by the fact that he was under the 100-hour standard for the prior 2 months and is expected to be under the standard during the next month; except that, at the option of the State, such definition need not include a father whose unemployment results from participation in a labor dispute or who is unemployed by reason of conduct or circumstances which result or would result in disqualification for unemployment compensation under the State's unemployment compensation law.[1]

Prior to July 12, 1973, when the said regulation was amended as above, it provided in part as follows:

> If a State wishes to provide AFDC for children of unemployed fathers, the State plan . . . must [with exceptions not here relevant] . . .:
>
> (1) Include a definition of an unemployed father . . . who:
>
> (i) Is employed less than 100 hours a month; or
>
> (ii) Exceeds that standard for a particular month, if his work is intermittent and the excess is of a temporary nature as evidenced by the fact that he was under the 100-hour standard for the 2 prior months and is expected to be under the standard during the next month.

The above State and Federal regulations were held invalid under Sec. 407(a) of the Social Security Act, 42 U.S.C. 607(a), which provides:

> The term "dependent child" shall, notwithstanding section 606(a) of this title, include a needy child who meets the requirements of section 606(a)(2) of this title, who has been deprived of parental support or care by reason of the unemployment (as determined in accordance with standards prescribed by the Secretary) of his father, and who is living with any of the relatives specified in Section 606(a)(1) of this title in a place of residence

[1] The full text of this regulation is contained in the Joint Appendix filed herewith (A. 124a).

maintained by one or more of such relatives as his (or their) own home.[2]

STATEMENT OF THE CASE

A. Francis v. Batterton

In this case, petitioner (hereafter "Maryland") is contesting the denial of a motion to vacate an injunction entered on March 6, 1972, requiring the State to pay AFDC-UF (also known as AFDC-E) benefits to the two classes represented by the plaintiffs, i.e. those disqualified from unemployment insurance because they were engaged in a labor dispute, and those disqualified because they were discharged for misconduct.

The case has had a long and involved course in the District Court, the Supreme Court and the Court of Appeals prior to this petition which illustrates the significance of the issues involved and a need for their final resolution at this time. The original complaint was filed on August 9, 1971. In it, plaintiffs requested that a Maryland social service regulation, Rule 200X.A.2 (now MARR 7.02.09 Sec. 10.A.(2)), be declared illegal and be permanently enjoined. Plaintiffs also requested the convening of a three-judge District Court and certification as a class action on behalf of all other persons similarly situated. Also, the complaint contended that the Maryland regulation violated the Equal Protection Clause, Section 407 of the Social Security Act, 42 U.S.C. 607, and the HEW regulation promulgated thereunder, 45 C.F.R. 233.100(a).

After the convening of a three-judge panel, the District Court issued an extensive opinion ruling on cross-motions for summary judgment, 340 F. Supp. 351

[2] The full text of 42 U.S.C. 607 is reprinted in the Joint Appendix at A. 34a.

(1972) (hereafter *Francis-I*) (A. 1a). In this opinion, the District Court specifically rejected the constitutional claim under *Dandridge v. Williams*, 397 U.S. 471 (1970). The court, however, did hold that as to the plaintiffs' and their represented classes, the Maryland regulation violated the federal *regulation* promulgated under the Social Security Act. Thereafter, on March 6, 1972, the Court enjoined the Maryland regulation as violative of the federal regulation (A. 54a). Maryland appealed that injunction to this Court. In an *amicus curiae* memorandum the Solicitor General of the United States urged this Court to summarily affirm the lower court ruling on the ground that the federal regulation was ambiguous and that the Secretary of HEW intended to amend it in order to clarify its meaning (A. 56a). Noting the effect of the proposed revision of the HEW regulation on the Maryland regulation, the Solicitor General stated:

> We are informed that under the proposed revision the regulation will expressly permit the States to vary, within limits, the coverage of their programs on the basis of factors other than the number of hours worked. This revision should remove any doubt concerning the validity of Maryland's Rule 200.X.A.2. *Such a regulation is clearly within the authority granted by the basic statute.* (A. 60a) (emphasis supplied)

Following the submission of the Solicitor General's memorandum, this Court summarily affirmed the decision below, 409 U.S. 904 (1972) (A. 61a).

On July 12, 1973, HEW did amend the pertinent federal regulation in the manner indicated, (A. 124a) and it is undisputed that that amendment clearly permits state regulations such as Maryland's regulation MARR 7.02.09 Sec. 10.A.(2). Accordingly, Maryland then moved the three-judge court to dissolve its injunction against the operation of the Maryland

regulation. In an informal letter opinion, the three-judge court announced its intention to grant Maryland's motion to dissolve the injunction (A. 61a1). However, the plaintiffs moved for reconsideration of this informal opinion, and the District Court granted such request and set the issue for hearing and briefs. On June 25, 1974, the District Court entered its decision denying Maryland's motion to dissolve the injunction, *Francis v. Batterton,* 379 F. Supp. 78 (*Francis-II*). (A. 79a). On July 25, 1974, Maryland filed notices of appeal of that decision in this Court and the Court of Appeals. The appeal to the Court of Appeals was designed to protect Maryland's appeal rights if this Court dismissed the appeal for want of jurisdiction. On December 9, 1974, this Court did dismiss the appeal on that basis and denied certiorari, treating the papers as a petition for a writ of certiorari before judgment, 419 U.S. 1042 (A. 99a). Maryland then pursued its appeal filed in the Court of Appeals. Maryland now is seeking review of the decision of the Court of Appeals on that appeal.

B. Bethea v. Batterton

The *Bethea* case involves an action in which individuals denied public assistance under Maryland's AFDC-UF program (that class of individuals unemployed as a result of being "voluntary quits") also challenged the constitutional, statutory and regulatory validity of the same Maryland regulation challenged in the *Francis* case. Following the filing of Maryland's Motion to Dismiss and the plaintiffs' Motion for Summary Judgment, the District Court entered an opinion dated November 27, 1974, which dismissed the State's motion and granted the plaintiffs' summary judgment (A. 86a). The opinion expressly approved the rationale of *Francis-II* and held that it also applied to the subject class (A. 96a). As a result, in a Judgment of

December 12, 1974, the District Court directed the State to pay benefits under Section 407 to all persons in the complaining class ". . . who would be eligible for these benefits but for the fact that they are ineligible to receive unemployment compensation due to having voluntarily quit their prior employment" (A. 98a). Maryland thereafter filed its Appeal of this order to the Court of Appeals, which was consolidated with that in *Francis-II.*

On September 22, 1975, the Court of Appeals, in its per curiam opinion affirmed the decisions in *Francis-II* and *Bethea* for the reasons stated by the District Court in both cases, and it adopted the opinions of the District Court as its own (A. 100a). In summary, the Court of Appeals held that the amended HEW regulation was invalid and that under the Social Security Act Maryland could not exclude from the benefits of AFDC-UF a child whose father is unemployed as a result of participation in a strike, misconduct, or voluntarily leaving his employment.

REASONS FOR GRANTING THE WRIT

I.

The reasoning in the decisions below holding the latest HEW regulation invalid denies HEW any discretion under the statute to prescribe standards for the determination of unemployment.

In the *Francis-I* decision, which was affirmed by this Court, the District Court recognized the broad discretion granted HEW under the Social Security Act to prescribe standards for the determination of "unemployment" and to grant some discretion to the States with regard to those standards. In the section of its opinion discussing the misconduct disqualification, the court emphasized the great weight to be given to the

federal agency's interpretation ". . . particularly when the Congress has delegated policy making to the Agency." 340 F. Supp., at 365 (A. 24a). When addressing the issue of the disqualification of persons involved in labor disputes, *i.e.*, strikers, the court noted:

> . . . when Congress removed the parenthetical words "as defined by the State," and substituted the words "as determined in accordance with standards prescribed by the Secretary," Congress did not simply substitute the words "as determined by the Secretary." Thus, Congress used words which did not mandatorily require the Secretary to require each state to adopt the same meaning of the word "employment" but instead merely *authorized* the Secretary to prescribe a national meaning if the Secretary so desired. In so doing, this Court agrees that the Congress empowered the Secretary, by regulation, to require each participating state (1) to include or (2) to exclude from its respective AFDC-E program those out of work because of involvement in labor disputes, or (3) to leave that decision to each state. (emphasis in original) 340 F. Supp., at 367 (A. 26a).

Finally, the District Court expressly suggested to HEW that it could validate the Maryland regulation with regard to such persons by modifying its regulation:

> The said obligations of the State of Maryland hereunder with regard to the labor involvement issue will of course be different if, forthwith after the filing of this opinion, the Secretary of HEW amends 45 C.F.R. § 233.100(a) in accordance with the discretionary authority conferred upon him by, and within the confines of, 42 U.S.C. § 607 as construed in this opinion. 340 F. Supp., at 368, n.29a. (A. 29a).

Thus, *Francis-I* emphasized HEW's discretion to prescribe standards under the statute, in addition to the hourly test already embodied in 45 C.F.R. 233.100(a)(1).

Contrary to the views expressed in its first decision, the District Court, and Court of Appeals have now concluded that under the discretion granted by the statute, HEW cannot grant any discretion to the States with regard to persons disqualified for misconduct, and any discretion as to strikers must be severly circumscribed although the nature of these additional standards is not spelled out. With regard to persons disqualified for misconduct, the lower courts now have adopted the view that "unemployment" means "unemployment" regardless of the statutory authority granted HEW for prescribing standards for the determination of that status question. In other words, the courts have adopted a literal or "plain meaning" test for certain of the statutory words. It is true that this is an established canon of statutory construction, but also that it is somewhat discredited, *e.g. United States v. Compas-Serrano,* 404 U.S. 293 (1971); *Lynch v. Overholser,* 369 U.S. 705 (1962); *Harrison v. Northern Trust Co.,* 317 U.S. 476 (1943); 2A Sutherland, *Statutory Construction,* Sec. 47.07 (4th ed., 1973). Such approach totally ignores, of course, the literal meaning of the words following the word "unemployment" namely those granting HEW the authority to prescribe standards for the determination of that status.

Even in *Francis-II* the District Court seems to recognize that HEW does have some discretion with regard to strikers. The court refers to alternative "(3)" in the language of the earlier opinion quoted above, indicating that HEW could have left this eligibility policy question to the states, and states that phrase should have included the additional words "in accordance with appropriate standards established by the Secretary." (A. 84a). After quoting selective legislative history the court then suggests that some sort of national standards, although not a national definition,

are required in this area, without specifying what the standards are to be. It is difficult to imagine what standards HEW could adopt in this area, other than requirements that all States pay strikers or not pay them.

II.

The decisions below run counter to this Court's efforts to delimit areas of State policy-making authority in the administration of the public assistance programs created by the Social Security Act.

The lower courts reasoning not only errs from the analysis in *Francis-I,* but ignores the rule for interpreting the Social Security Act recently asserted by this Court in another welfare case:

> In interpreting this statute, we must be mindful that "the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong. . . ." (citations omitted) *New York State Department of Social Services v. Dublino,* 413 U.S. 405, at 421 (1973).

During the course of its consideration of Maryland's motion to dissolve the previously issued injunction, the District Court requested and received the views of HEW on the validity of its new regulation in light of plaintiffs' contentions. That HEW amicus brief is included in the Appendix, (A. 61a2) and makes clear beyond peradventure that although the interpretation of the statute in *Francis-II* is *permissible,* neither the words of the statute nor the legislative history compel such a literal construction of the word "unemployment" as to persons disqualified for misconduct or the uniform, national definition as to the inclusion or exclusion of strikers required by the opinion.

In addition to their impact on the AFDC-UF program, the decisions below could result in future holdings involving other Federal-State welfare programs created under the Social Security Act contrary to the rule announced in *New York State Department of Social Services v. Dublino, supra.* Prior to the *Dublino* decision, certain decisions of this Court seemed to suggest that the States could not impose additional eligibility conditions in their regular AFDC programs in the absence of an express congressional authorization for such conditions indicated in the Social Security Act or its legislative history, *Townsend v. Swank,* 404 U.S. 282, 286 (1971); *Carleson v. Remillard,* 406 U.S. 598, 600 (1972); *King v. Smith,* 392 U.S. 309 (1968). The *Dublino* decision, however, made clear that there was room for additional State eligibility conditions in situations where the language of the Act did not expressly make the persons eligible. In discussing the earlier cases and the extent of State discretion, this Court stated:

> In those cases it was clear that state law excluded people from AFDC benefits whom the Social Security Act expressly provided would be eligible. The Court found no room either in the Act's language or legislative history to warrant the States' additional eligibility requirements. Here, by contrast, the Act allows for complementary state work incentive programs and procedures incident thereto — even if they become conditions for continued assistance. Such programs and procedures are not necessarily invalid, any more than other supplementary regulations promulgated within the legitimate sphere of state administration. (citations omitted) 405 U.S. 413, at 423.

III.

By substituting their own interpretation of the statutory words and intent for that of HEW, the lower courts have usurped the "legislative" rule-making authority expressly granted to HEW by the statute.

In substituting their own interpretation of the statute for that of HEW, the lower courts also violate established principles of administrative law, *e.g. Bowles v. Seminole Rock Co.*, 325 U.S. 410, 413-14 (1945). *Udall v. Tallman*, 380 U.S. 1, 16-18 (1965). Furthermore this interpretation supplanted a "legislative" rule which the Congress had expressly directed the agency to develop for the implementation of the statute, rather than an interpretative rule, adding an administrative gloss to a statutory term. See Davis, *Administrative Law Treatise*, Secs. 5.03 and 5.04, and cases cited therein (1958 and 1970 Supplement). A legislative regulation has the effect of law and is binding upon a court unless it is in excess of the granted power, issued pursuant to improper procedures, or unreasonable, *ibid, e.g. FCC v. Schreiber*, 381 U.S. 279 (1965).

The legislative history of the statutory provisions attached to and discussed in *Francis-I* shows strong congressional concern that AFDC-UF payments not go to persons who are "voluntarily" unemployed. The materials also show an intent that HEW develop national standards for determining unemployment, particularly as to hours worked, but not a mandatory, uniform federal definition of "unemployment" addressing all possible eligibility questions. The *Francis-II* decision not only violates established principles for construing legislative rules, but also raises questions as to any rules in which some discretion, however limited, has been granted to the States or other governmental

units or organizations participating in the administration of the program involved.

IV.

The Court should review the decisions below because of their major impact on the administration of the AFDC-UF program and the great public interest in the issues involved.

The net effect of the decisions below is to require AFDC-UF payments to all persons who come within the literal meaning of the statute, whether fired for misconduct, or on strike, and to deny HEW and/or the States any meaningful discretion as to the development of eligibility requirements, despite the grant of authority to HEW in the statute and the legislative history which indicated a reluctance to pay such benefits to persons "voluntarily unemployed". This holding will obviously have a substantial impact on the administration of AFDC-UF nationally. HEW advised the District Court that of a total of 23 States which operate the AFDC-UF program, at least 5 States, in addition to Maryland, impose eligibility conditions with regard to strikers, *Francis-I*, 340 F. Supp. at 363, n.22 (A. 19a).

The lower Courts' decisions now invalidate the new HEW regulation designed to make the legality of those conditions clear. That regulation was adopted by HEW, as a result of, and presumably in accord with, the *Francis-I* decision, and after the careful consideration of thousands of comments from interested persons and organizations, 38 Fed. Reg. 49 (January 3, 1973) and 18549 (July 12, 1973). Unless the holding of the *Francis-II* decision is reversed, it seems unlikely that HEW can develop any meaningful standards under the statute.

Despite its previous failures, HEW has again begun the difficult task of developing a regulation which will pass judicial scrutiny. On August 8, 1975, one month after argument of these cases before the Court of Appeals, HEW published new, proposed amendments to 233.100(a)(1) designed to meet the objections to the present regulation set forth in *Francis-II*, 40 Fed. Reg. 33461 (A. 121a). This latest proposal would only prohibit benefits to fathers whose unemployment results from involvement in a labor dispute when such involvement disqualifies or would disqualify them from unemployment insurance. As a result of this single disqualification, this new revision presumably would mandate AFDC-UF payments to the remaining classes involved in these proceedings, "misconducts" and "voluntary quits". Thus, this proposed amendment would substantially amend the operation of AFDC-UF in the great majority of States which now do not prohibit AFDC-UF payments to strikers. Although the period for comments on the proposal expired on September 8, 1975, no further action has been taken by HEW, and the status of the proposal is unknown.

If the proposal is adopted, it is quite likely that the sub-class of strikers involved in these proceedings would continue to press their claim for AFDC-UF benefits. For that reason, the adoption of the regulation would by no means settle or end the dispute, but only add another chapter to this four-year litigation. Therefore, the issue of the proper scope of HEW's authority, and that of the states, under Section 407(a) of the Social Security Act should be reviewed and resolved by this Court now.

The question as to the eligibility of strikers for payments has come to this Court before without any

final resolution of that question, *ITT Lamp Div. v. Minter*, 318 F. Supp. 364 (D. Mass., 1969), aff'd., 435 F.2d 989 (1st Cir., 1970), cert. denied, 402 U.S. 933 (1971); *Super-Tire Engineering Co. v. McCorkle*, 469 F.2d 911 (3rd Cir. 1972), rev'd and remanded, 414 U.S. 1107 (1974). With the involvement of the Chamber of Commerce as a party, it would appear that this case might be an appropriate one for resolving this separate issue. A reversal of the decisions below and an affirmance of the validity of the present HEW regulation would make clear the right of States to pay or not pay AFDC-UF to families of strikers as each State determined appropriate.

CONCLUSION

By its affirmance of *Francis-I,* this Court sought to encourage an administrative solution of the issues raised in this litigation by means of a new regulation proposed by HEW. Despite the adoption of that regulation, the lower courts have refused to vacate the previous injunction, even though the stated bases for that injunction have been removed. For the reasons indicated the decisions of the courts below now raise substantial questions of public importance concerning Federal and State administrative authority over welfare and other governmental programs. Therefore, this Court should grant plenary review of the decision below. Also, because of the holding below that the new HEW regulation is invalid the Court should request the views of the Solicitor General on the issues raised in this proceeding.

Respectfully submitted,

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APPLICATIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITIONERS' JOINT APPENDIX

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In The United States District Court,
For The District of Maryland

Civil No. 71-853-K.

Robert Francis, individually and on behalf of his minor children, Robert J. Francis, et al.

v.

Rita C. Davidson, Secretary, Department of Employment and Social Services, and Raleigh C. Hobson, Director, Social Services Administration.

Department of Health, Education & Welfare, the U. S. Chamber of Commerce, the Maryland State Chamber of Commerce, and the Chamber of Commerce of Metropolitan Baltimore, Amici Curiae.

January 28, 1972

Frank A. Kaufman, District Judge.

This case involves constitutional and other issues arising in connection with the administration of the AFDC-E program.[1] Plaintiffs are fathers, who, on

[1] AFDC-E (sometimes known as AFDC-UF, the UF standing for unemployed fathers v. the E for employment or employed) is the short, commonly-used reference label for a program established by the Congress in 1961 pursuant to 42 U.S.C. § 607, providing aid for children in a family in which the father is unemployed. Prior to the enactment of that statute, there had been in existence a program known as AFDC pursuant to 42 U.S.C. §§ 601-606 under which aid was made available for children in families in which the father was absent from the home, incapacitated or dead. *See King v. Smith*, 392 U.S. 309, 88 S. Ct. 2128, 20 L. Ed. 2d 1118 (1968). That program was continued in effect after the establishment of the AFDC-E program. Since 1961, the two programs have run side by side. Both depend upon a combination of federal and state funds and are administered by the states under

behalf of themselves and others similarly situated, allege that benefits under that program have been denied to their respective children by the Department of Employment and Social Services of the State of Maryland under Rule 200.X.A. (2) of that Department,[2] in violation of (a) 42 U.S.C. § 607[3] and 45 C.F.R. § 233.100(a),[4] and (b) the Fourteenth Amendment of the Federal Constitution. Defendants, named in their individual and representative capacities, are, respectively, the Secretary of the Maryland Department of Employment and Social Services and the Director of the Maryland Social Services Administration, a division of that Department.[5] HEW has submitted its views with regard to the issues in this case, pursuant to the request of this Court addressed to that agency in accordance with the strong policy suggestion stated by the Supreme Court of the United States in Rosado v. Wyman, 397 U.S. 397, 90 S. Ct. 1207, 25 L. Ed. 2d 442 (1970).[6] The

regulations promulgated by the Department of Health, Education and Welfare (HEW) pursuant to statutory authority delegated to HEW by the Congress.

The history of AFDC is discussed in Dandridge v. Williams, 397 U.S. 471, 90 S. Ct. 1153, 25 L. Ed. 2d 491 (1970), and in Rosado v. Wyman, 397 U.S. 397, 90 S. Ct. 1207, 25 L. Ed. 2d 442 (1970). All states participate in AFDC. The history of AFDC-E is set forth in Macias v. Finch, 324 F. Supp. 1252 (N.D. Calif. 1970). Twenty-two states and the District of Columbia presently participate in AFDC-E.

[2] See n. 14 *infra*.

[3] See n. 10 *infra*.

[4] See n. 12 *infra*.

[5] During the pendency of this case, Raleigh C. Hobson resigned as the Director of the Social Services Administration and his replacement, Dr. Irene Olson, automatically became a party defendant herein in his place and stead pursuant to Federal Civil Rule 25(d)(i).

[6] Whenever possible the district courts should obtain the views of HEW in those cases where it has not set forth its views, either in a regulation or published opinion, or in cases where there is a real doubt as to how the Department's standards apply to the particular state regulation or program.
Rosado v. Wyman, *supra* at 407-408, 90 S. Ct. at 1215 (footnote omitted).

United States Chamber of Commerce and the Chamber of Commerce of Metropolitan Baltimore were permitted to file amicus briefs and to take part in oral argument.[7]

Robert Francis, one of the two original plaintiffs in this case, became out of work on July 1, 1971 when the union, of which he was a member, called a strike at the plant at which he was working. The other original plaintiff, Franklin Wilkens, was discharged from his employment on June 22, 1971 because of gross misconduct. Wilkens subsequently obtained new employment and withdrew his complaint herein. At the time of Wilkens' withdrawal, Edward Wright was granted leave to become a plaintiff herein.[8] Wright's employer discharged him on May 12, 1971 for alleged gross misconduct (excessive absenteeism). Both Francis and Wright (as well as Wilkens during the period he was out of work) applied for and were denied AFDC-E benefits by the Department of Social Services of the City of Baltimore. Wright is still out of work. Francis went back to work on September 10, 1971 when the strike which had been called by his union ended.

In the 1961 legislation originating the AFDC-E program, the term "dependent child" was defined in 42 U.S.C. § 607(a), Pub. L. No. 87-31, § 407, 75 Stat. 75 (1961), to include "a needy child" under the age of

[7] The United States Chamber of Commerce, which sought leave to intervene herein as a party under Federal Civil Rule 24(b), was given the opportunity, both in written and oral argument, to present its contentions against the background of proffered facts which the national Chamber stated it stood ready to prove if permitted to intervene as a party. In this opinion, this Court assumes, *arguendo* only, the correctness of those proffered facts, and for that reason, without determining whether such intervention would, in the words of Rule 24(b), unduly delay or prejudice the adjudication of the rights of the original parties," concludes that there is no reason to permit the same and accordingly hereby denies the said application to intervene.

[8] The two original plaintiffs, Wilkens and Francis, as well as the plaintiff Wright, were permitted to proceed in forma pauperis after filing affidavits indicating their lack of-funds and property.

eighteen "who has been deprived of parental support or care by reason of the unemployment (*as defined by the State)*" of a parent, and who is living with any of his relatives "in a place of residence maintained by one or more of such relatives as his (or their) own home." (Emphasis added). In 1968, Congress enacted extensive amendments and, *inter alia,* replaced the word "parent" with the word "father," replaced the above italicized parenthetical words with the words "as determined in accordance with standards prescribed by the Secretary," and added 42 U.S.C. § 607(b), providing as follows:

> The provisions of subsection (a) of this section shall be applicable to a State if the State's plan approved under section 602 of this title—[9]
>
> (1) requires the payment of aid to families with dependent children with respect to a dependent child as defined in subsection (a) of this section when—
>
> (A) such child's father has not been employed (*as determined in accordance with standards prescribed by the Secretary)* for at least 30 days prior to the receipt of such aid. [Emphasis added.][10]

[9] 42 U.S.C. § 602 provides that each state shall have the right to submit its own plan for the administration of its AFDC-E program, provided same meets the standards of the statute. Congress is not required to provide funds to a state without such a program. King v. Smith, *supra;* Carroll v. Finch, 326 F. Supp. 891 (D. Alaska 1971); Woolfolk v. Brown, 325 F. Supp. 1162, 1170-1171 (E.D. Va. 1971); Cooper v. Laupheimer, 316 F. Supp. 264, 268 (E.D. Pa. 1970). Nor is a state required to have an AFDC-E program. Henry v. Betit, 323 F. Supp. 418 (D. Alaska 1971).

All references in this opinion to the "Secretary" are to the Secretary of HEW, except to the extent that there is specific reference to the Secretary of the Department of Employment and Social Services of the State of Maryland.

[10] 42 U.S.C. § 607, in its entirety, as amended in 1968 and as presently in force and effect, is set forth in Appendix A. In addition to the amendments enacted by the Congress in 1968, certain other amendments, not material herein, have been made to 42 U.S.C. § 607 since the inception of the AFDC-E program.

After the 1968 statutory amendments by the Congress, the Secretary of HEW promulgated, as 45 C.F.R. § 233.100(a), a regulation, providing, *inter alia,* that "[i]f a State wishes to provide AFDC for children of unemployed fathers, the State plan * * * must, except as specified in paragraph (b) of this section[11] * * * [i]nclude a definition of an unemployed father * * * [and] shall include any father who is employed less than 30 hours a week, * * *"[12]

[11] The exceptions set forth in (b) are not material herein.

[12] Effective October 1, 1971, the Secretary amended the regulation to substitute "100 hours a month" for "30 hours a week." 36 Fed. Reg. July 21, 1971.

That regulation also requires that any such plan shall provide for payments only if the "father has been unemployed for at least 30 days prior to the receipt of such aid" and only if the "father has not without good cause, within such 30-day period prior to the receipt of such aid, refused a bona fide offer of employment or training for employment" and only if the "father (a) has six or more quarters of work * * * [The regulation states that "[a] 'quarter of work' with respect to any individual means a period * * * in which he received earned income of not less than $50 * * *."], within any 13-calendar-quarter period ending within 1 year prior to the application for such aid, or (b) within such 1-year period, received unemployment compensation under an unemployment compensation law of a State or of the United States, or was qualified * * * for such compensation under the State's unemployment compensation law." The regulation further provides that "[a]n individual shall be deemed 'qualified' for unemployment compensation under the State's unemployment compensation law if he would have been eligible to receive such benefits upon filing application, or he performed work not covered by such law which, if it had been covered, would (together with any covered work he performed) have made him eligible to receive such benefits upon filing application." The regulation specifically calls for "the denial of * * * aid * * * [i]f, and for as long as, such child's father is not currently registered with the public employment offices in the State, and [w]ith respect to any week for which such child's father receives unemployment compensation under an unemployment compensation law of a State or of the United States."

45 C.F.R. § 233.100(a), 34 Fed. Reg. 1146 (1969), as continuously in force and effect since 1969, is set forth in Appendix B.

Section 6 of Maryland's Unemployment Insurance Law, Md. Ann. Code art. 95A, § 6 (1969 Repl. Vol.), sets forth certain disqualifications for benefits and provides, *inter alia,* that an individual shall be disqualified for benefits when he is discharged for "gross misconduct" (section 6(b)), and when the Executive Director finds that "his *unemployment* is due to a *stoppage of work,* other than a lockout, which exists because of a labor dispute * * * [emphasis added]."[13]

Rule 200.X.A. of the Social Services Administration, Department of Employment and Social Services, of the State of Maryland, denies AFDC-E aid if the father is "disqualified for unemployment insurance."[14]

[1, 2] Plaintiffs, on behalf of themselves and others similarly situated, seek injunctive and declaratory relief as well as damages in the form of the payment of AFDC-E benefits withheld by the State of Maryland pursuant to Rule 200.X.A.[15] Because injunctive relief is sought, *inter alia,* restraining state officials "from the enforcement, operation and execution of a statewide regulation on the ground of its unconstitutionality," King v. Smith, 392 U.S. 309 n. 3, 88 S. Ct. 2128, 2130, n. 3, 20 L. Ed. 2d 1118 (1969), and because those allegations of unconstitutionality are not so frivolous or so obviously lacking in merit as not to require the convening of a three-judge court, *see* Md. Citizens for Representative General Assembly v. Governor of Maryland, 429 F.2d 606, 611 (4th Cir. 1970), this three-judge court was convened pursuant to 28 U.S.C. § 2281.

[13] Md. Ann. Code art. 95A, § 6 is set forth in Appendix C.

[14] Rule 200.X.A. provides, in part, as follows:
A grant may not be paid from GPA or AFDC-E:
* * * * * *
2. To meet need due to being disqualified for unemployment insurance.

[15] While exhaustion is not required in actions brought under 42 U.S.C. § 1983, and 28 U.S.C. § 1343, "where the constitutional challenge is sufficiently substantial, as here, to require the convening of a three-judge court," King v. Smith, *supra* at 312 n. 4, 88 S. Ct. at 2131 n. 4, plaintiffs herein have in fact exhausted their state administrative remedies.

I.

Plaintiffs assert jurisdiction in this case pursuant to 28 U.S.C. § 1343(3)[16] and (4),[17] which are jurisdictional counterparts of 42 U.S.C. § 1983,[18] the violation of which is alleged by plaintiffs. In a concurring opinion in Hague v. C.I.O., 307 U.S. 496, 59 S. Ct. 954, 83 L. Ed. 1423 (1939), Mr. Justice Stone wrote (at 531, 59 S. Ct. at 971) that section 1343(3) applied "whenever the right or immunity is one of personal liberty, not dependent for its existence upon the infringement of property rights." In Weddle v. Director, Patuxent Institution, 436 F.2d 342, 343 (4th Cir. 1970), Judge Winter, noting his acceptance of Judge Friendly's analysis in Eisen v. Eastman, 421 F.2d 560 (2d Cir. 1960), held that "[w]here, as here, the infringement is one solely of property rights, § 1331 is the applicable jurisdictional statute, and jurisdiction may be sustained only upon

[16] 28 U.S.C. § 1343(3) and (4) provides:

The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

* * * * * *

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

[17] See n. 20 *infra*.

[18] 42 U.S.C. § 1983 provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

satisfaction of the amount in controversy requirement [footnote omitted]."[18a] *See also* Garren v. City of Winston-Salem, North Carolina, 439 F.2d 140 (4th Cir. 1970).

In King v. Smith, *supra*, the Supreme Court declared invalid as inconsistent with certain provisions of the Social Security Act, Alabama's "substitute father" regulation, pursuant to which Alabama denied AFDC aid to the children of a mother who "cohabits" in or outside her home with any single or married able-bodied man. In *King*, after noting the constitutional equal protection attack which had been held meritorious by the three-judge district court below, a view which Mr. Justice Douglas, concurring specially (392 U.S. at 334-336, 88 S. Ct. 2128), would have adopted in place of what he characterized (at 334, 88 S. Ct. 2128) as "the statutory route" followed by the majority of the Court, Mr. Chief Justice Warren, for the majority, wrote (at 313 n. 3, 88 S. Ct. at 2131):

> We intimate no views as to whether and under what circumstances suits challenging state AFDC provisions only on the ground that they are inconsistent with the federal statute may be brought in federal courts.

In Eisen v. Eastman, *supra*, 421 F.2d at 564, Judge Friendly suggested that "it is quite arguable that *King* came within Justice Stone's formulation on the basis that Alabama's 'substitute father' regulation not merely caused economic loss to Mrs. Smith's children, but also infringed their 'liberty' to grow up with financial aid for their subsistence and her 'liberty' to have Mr. Williams visit her on weekends."

In Rosado v. Wyman, 397 U.S. 397, 90 S. Ct. 1207, 25 L. Ed. 2d 442 (1970), in which a New York statute was held to have defined a standard of need for AFDC payments in violation of the federal statutory standard, Mr. Justice Harlan (at 405 n. 7, 90 S. Ct. at 1214) did not

[18a] In *Weddle*, an inmate in an institution alleged custodial officers had taken several items of his personal property.

reach the issue posed by Mr. Justice Stone's formula in *Hague*, stating:

> Since we conclude that the District Court properly exercised its pendent jurisdiction, we have no occasion to consider whether, as urged by petitioners, this statutory claim satisfies the $10,000 amount-in-controversy requirement of the general federal jurisdiction provision, 28 U.S.C. § 1331, or whether it could be maintained under 28 U.S.C. § 1343(3), which contains no amount-in-controversy limitation, as an action "[t]o redress the deprivation, under color of any State law . . . of any right, privilege or immunity secured by . . . any Act of Congress providing for equal rights of citizens. . . ." See King v. Smith, 392 U.S., at 312 n. 3, [88 S. Ct. 2128, 20 L. Ed. 2d 1118] see generally Note, Federal Judicial Review of State Welfare Practices, 67 Col. L. Rev. 84 (1967).

On the same day as *Rosado* was decided, the Supreme Court in Dandridge v. Williams, 397 U.S. 471, 90 S. Ct. 1153, 25 L. Ed. 2d 491 (1970), held valid and non-violative of equal protection principles Maryland's placing of a dollar limit per month upon AFDC grants without regard to need or to size of family. In so doing, while the Supreme Court reversed the three-judge district court's contrary determination on the merits, it took no issue with the district court's holding that "[j]urisdiction is properly invoked under Civil Rights Act, 28 U.S.C.A. § 1343(3) and (4), and 42 U.S.C.A. § 1983 * * *." Williams v. Dandridge, 297 F. Supp. 450, 453 (D. Md. 1968). Earlier in Lewis v. Martin, 397 U.S. 552, 90 S. Ct. 1282, 25 L. Ed. 2d 561 (1970), the Supreme Court held a California welfare regulation invalid upon statutory grounds without indicating any doubts as to the existence of jurisdiction. And still earlier, in a per curiam opinion in Shapiro v. Solman, 396 U.S. 5, 90 S. Ct. 25, 24 L. Ed. 2d 5 (1969), the Supreme Court affirmed a three-judge district court opinion, 300 F. Supp. 409 (D. Conn., 1969), in which a Connecticut welfare practice was invalidated upon statutory grounds and in which section 1343(3) jurisdiction was held to exist. Most recently, in Townsend v. Swank, 404 U.S. 282, 92 S. Ct.

502, 30 L. Ed. 2d 448 (1971), reversing the judgment below for defendants in Alexander v. Swank, 314 F. Supp. 1082 (D. Ill. 1971), the Supreme Court, in considering a challenge under 42 U.S.C. § 1983 to Illinois' AFDC program on the grounds that the latter was inconsistent with federal law and this void under the Supremacy Clause, and was also violative of equal protection principles, raised no question concerning the assumption of jurisdiction by the court below and reversed on the ground that the Illinois statute and regulation conflicted with federal law and were invalid under the Supremacy Clause. Mr. Justice Brennan wrote that the Court therefore did not reach the equal protection issue (92 S. Ct. at p. 508). However, he did note (at p. 508 of 92 S. Ct.) that "we think there is a serious question whether the Illinois classification can withstand the strictures of the Equal Protection Clause." Concurring, Mr. Chief Justice Burger stressed that in his opinion the "appropriate inquiry in any case should be simply whether the State has indeed adhered to the provisions [of the federal statute] and is accordingly entitled to utilize federal funds in support of its program. Cf. Rosado v. Wyman, 397 U.S. 397, 420 [90 S. Ct. 1207, 25 L. Ed. 2d 442] (1970)." (at p. 508 of 92 S. Ct.).

In Tichon v. Harder, 438 F.2d 1396 (2d Cir. 1971), Judge Anderson, in a case involving discharge of a probationary employee of Connecticut's Department of Welfare, wrote (at 1399): "It is apparent, however, as *Eisen* recognized, that some classes of cases are not readily characterized as involving either rights of personal liberty or property rights but take on characteristics of both. Cases challenging the procedures used in a discharge from public employment are such a class." In *Tichon*, the Second Circuit held (at 1402) that "in the absence of a clear, immediate and substantial impact on the employee's reputation which effectively destroys his ability to engage in his occupation,[19] it cannot be said that a right of personal liberty is

[19] The existence of such facts does seem to tip the scales towards the personal liberty side of the equation and to cause § 1343 (3) jurisdiction to be present. Birnbaum v. Trussell, 371 F.2d 672 (2d Cir. 1966).

involved" (footnote omitted), and also commented (at 1400) that "unlike welfare recipients, who exist at a bare subsistence level, it cannot be said that an employee's rights to the profits from his job entail 'some sort of right to exist in society.' Johnson v. Harder, 438 F.2d 7 (2 Cir. 1971)."

Johnson v. Harder, *supra,* involved a challenge to Connecticut's action in reducing AFDC payments to a mother with ten children by the amount of Old Age, Survivors and Disability Insurance benefits payable to two of the children because of the death of their father. Writing (438 F.2d at 12) that "[s]ince welfare cases by their very nature involve people at a bare subsistence level, disputes over the correct amounts payable are treated not merely as involving property rights, but some sort of right to exist in society, a personal right under the Stone formula" (footnote omitted), and distinguished McCall v. Shapiro, 416 F.2d 246 (2d Cir. 1969), in which a Connecticut welfare regulation was challenged on appeal only upon statutory grounds and in which section 1343 jurisdiction was held lacking, Judge Smith, for himself and Chief Judge Lumbard and Judge Anderson, held (438 F.2d at 12) that "so long as a colorable constitutional claim has been raised, jurisdiction will properly lie." Holding the constitutional claim before it not to be insubstantial, the Court in Johnson v. Harder, *supra,* filed after the Supreme Court's opinion in Dandridge v. Williams, *supra,* held the constitutional (equal protection and due process) claims before it not "to be insubstantial in the light of the recent Supreme Court AFDC cases" (438 F.2d at 13).

Just a few days ago, in Russo v. Kirby, 453 F.2d 458 (2d Cir. 1971), Judge Hays, writing for himself and Judges Moore and Mulligan, in a class action case in which the district court had granted a preliminary injunction on the ground that the New York Social Services Law's provision prohibiting the granting of welfare benefits to strikers infringed federal rights of the plaintiff-claimants, reversed the judgment of the district court below holding that no individual claim of any one plaintiff exceeded $10,000, that aggregation of claims was impermissible under Snyder v. Harris, 394

U.S. 332, 89 S. Ct. 1053, 22 L. Ed. 2d 319 (1969), that "no colorable constitutional claim is presented," citing Dandridge v. Williams, *supra,* as dispositive of the equal protection contention, and that accordingly no federal jurisdiction existed under 28 U.S.C. § 1343 or under 28 U.S.C. § 1337.[19a]

Less than two years earlier, Judge Hays, concurring specially in a three-judge district court case, in McClellan v. Shapiro, 315 F. Supp. 484, 494 (D. Conn. 1970), expressed similar views in stating his disagreement with the majority's assumption of jurisdiction in a suit challenging the validity of Connecticut's definition of a "dependent child" in its AFDC program. Judge Blumenfeld, for the majority, held the Connecticut statute to be valid, after first determining at the threshold, in disagreement with Judge Hays, that jurisdiction was present under the authority of Judge Friendly's suggested reading of King v. Smith, *supra,* in Eisen v. Eastman, *supra.*

In Roberge v. Philbrook, 313 F. Supp. 608 (D. Vt. 1970), Judge Leddy, after reviewing in depth, *inter alia,* Rosado v. Wyman, King v. Smith, Eisen v. Eastman, as well as numerous other federal court opinions rendered in jurisdictions outside the Second Circuit, held section 1343(3) jurisdiction to be present in a welfare case. In Henry v. Betit, 323 F. Supp. 418 (D. Alaska 1971), the Court, after referring to King v. Smith, Dandridge v. Williams, Eisen v. Eastman, McCall v. Shapiro, and McClellan v. Shapiro, also concluded that it had jurisdiction. In addition, *see* Caulder v. Durham Housing Authority, 433 F.2d 998 (4th Cir. 1970), in which the Fourth Circuit, in a post-*Weddle* opinion written by Judge Winter, assumed jurisdiction under 1343(3) in a 1983 case in which the right to inhabit a federally assisted housing project was involved; and Wheeler v. Adams Company, 322 F. Supp. 645, 655 (D. Md. 1971), in which such jurisdiction was similarly assumed in connection with a procedural due process attack upon certain replevin procedures.

[19a] See n. 20 *infra.*

[3, 4] While it is the understatement of the new year 1972 to say that the matter is not free of doubt, this Court, in the absence of any clear guidance from the Supreme Court or from the Fourth Circuit, adopts the approach followed in Johnson v. Harder, *supra,* and holds that the alleged deprivation of AFDC-E benefits in this case constitutes an allegation of infringement of personal liberties and that the constitutional equal protection contentions advanced by plaintiffs herein, while rejected, are not frivolous. "[W]hether the complaint states a cause of action on which relief could be granted * * * must be decided after and not before the court has assumed jurisdiction over the controversy," Bell v. Hood, 327 U.S. 678, 682, 66 S. Ct. 773, 776, 90 L. Ed. 939. (1946). Once having assumed jurisdiction because of the constitutional challenge, this Court believes that whether or not jurisdiction would otherwise exist, it should continue to assert its jurisdiction and proceed to resolve the issues herein involving federal statutes and federal regulations. The views stated by Mr. Justice Harlan in Rosado v. Wyman, *supra,* 397 U.S. at 402-403 and 422-423, 90 S. Ct. 1207, 25 L. Ed. 2d 442, and by Mr. Chief Justice Warren in King v. Smith, *supra,* would appear so to teach.[20]

[20] This Court thus finds it unnecessary to determine if jurisdiction also exists in this case under 28 U.S.C. § 1343(4), or whether the *Hague-Eisen-Weddle* distinction applies in connection with § 1343(4) as well as § 1343(3). For opinions in which those two subsections have been, on the one hand, seemingly considered as one, and, on the other hand, as constituting separate jurisdictional bases, *see, e. g.,* Dale v. Hahn, 440 F.2d 633, 641 (2d Cir. 1971); Eisen v. Eastman, 421 F.2d at 562 n. 2; McCall v. Shapiro, *supra;* Roberge v. Philbrook, 313 F. Supp. at 614-615 n. 7. Nor does this Court reach the question of whether jurisdiction is present herein under 28 U.S.C. § 1337 which provides:

> The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies.

In Russo v. Kirby, *supra,* Judge Hays held jurisdiction under § 1337 did not attach because the case did not arise "directly" under federal law. *Cf.* Barlow v. Marriott Corporation, 328 F. Supp. 624 (D. Md. 1971). The possibility that § 1337 jurisdiction exists in this case has not been raised by counsel. Nor has this Court found any cases other than *Russo* in which plaintiffs have challenged a state welfare statute or regulation as violative of welfare rights allegedly created by federal statutes or regulations and in which jurisdiction has been suggested under § 1337.

II.

[5, 6] Originally, in their complaint, plaintiffs asked this Court to permit this proceeding to take place as a class action under Federal Civil Rule 23(a) and (b) (2). During oral argument, counsel for plaintiffs stated agreement with a position suggested by this Court, namely, that if this Court should determine that it has no power to award damages in this case, there would be no need to form a class herein. Nevertheless, there may be reason to form the class herein, in order to avoid the possibility of mootness in view of the fact that the plaintiff Francis has returned to work (see p. 355 *supra*). *See* Doremus v. Board of Education, 342 U.S. 429, 72 S. Ct. 394, 96 L. Ed. 475 (1952); and Troy State University v. Dickey, 402 F.2d 515 (5th Cir. 1968). *See also* SEC v. Medical Committee for Human Rights, 404 U.S. ____, 92 S. Ct. 577, 30 L. Ed. 2d 560 (1972); Barrows v. Jackson, 346 U.S. 249, 257 n. 3, 73 S. Ct. 1031, 97 L. Ed. 1586 (1953); Smith v. Board of Education, 365 F.2d 770, 776 (8th Cir. 1966). While this Court recognizes that the continuing importance of the resolution of the issue relating to involvement in labor disputes might cause the nonapplication of any principles of mootness, *see* ITT Lamp Division v. Minter, 435 F.2d 989, 991 (1st Cir.), cert. denied, 402 U.S. 933, 91 S. Ct. 1526, 28 L. Ed. 2d 868 (1971), reh. denied, 404 U.S. 874, 92 S. Ct. 27, 30 L. Ed. 2d 120; Jenkins v. United Gas Corp., 400 F.2d 28 (5th Cir. 1968), this Court, because this action does fall rather precisely within the language of Federal Civil Rule 23(b) (2), hereby determines that this action shall be maintained as a class action on behalf of two separate subclasses, namely, (1) those who have applied unsuccessfully for AFDC-E benefits and have been involved in a labor dispute and (2) those who have also

so applied and have been so denied because they have been discharged by their respective previous employers for misconduct. In so determining, this Court finds that each of the said two classes is so numerous that joinder of all members is impractical; there are questions of law and fact common to the members of each of the said two classes; the claims of the respective parties herein are typical of the claims of all members of the class to which those representatives respectively belong; the representative parties will fairly and adequately protect the interests of the class; and counsel for the named plaintiffs have most diligently and competently represented the interests of the members of the two subclasses. Because the classes are designated pursuant to Rule 23(b) (2), no notice is required by Rule 23(c) (2). While, in some instances, notice to each member of the class may be required in order to avoid violation of due process principles, in this case, this Court, under the circumstances, holds that notice need not be given to each member of the two classes. If any retroactive payments are required (see the discussion at p. 371, *infra*), this Court has confidence that the federal and Maryland authorities will take appropriate steps to inform all persons entitled to such benefits of their rights thereto. For a discussion of notice requirements in class suits pursuant to Federal Rule 23, *see,* on the one hand, Johnson v. Georgia Highway Express, Inc., 417 F.2d 1122 (5th Cir. 1969); Northern Natural Gas Co. v. Grounds, 292 F. Supp. 619, 636 (D. Kan. 1968), as contrasted with Eisen v. Carlisle and Jacquelin, 391 F.2d 555 (2d Cir. 1968). *See also* 3B J. Moore, Federal Practice, ¶ 2355 at 1152-53 (2d ed. 1969), favoring the views expressed in the first two cases that notice in a Rule 23(b) (2) case is not always required.

[7, 8] In Dandridge v. Williams, *supra*, 397 U.S. at 478, 90 S. Ct. at 1158, 25 L. Ed. 2d 491, Mr. Justice Stewart wrote:

> * * * In King v. Smith, supra, we stressed the State's "undisputed power," under these provisions of the Social Security Act, "to set the level of benefits and the standard of need." Id. at 334. [20 L. Ed. 2d at 1135] * * * We described the AFDC enterprise as "a scheme of cooperative federalism", id. at 316 [20 L. Ed. 2d at 1125] * * *, and noted carefully that "[t]here is no question that states have considerable latitude in allocating their AFDC resources, since each State is free to set its own standard of need and to determine the level of benefits by the amount of funds it devotes to the program." Id. at 318-319 [20 L. Ed. 2d at 1126] * * *.

Those comments would seem to apply with equal force to the AFDC-E program. In *Dandridge,* Mr. Justice Stewart, speaking for a unanimous Court and holding that Maryland's administrative practice which imposed an upper limit on the total amount of money any one family unit might receive under the AFDC program, did not violate the Equal Protection Clause and was not in conflict with any provision of the Social Security Act, also wrote:

> In the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. If the classification has some "reasonable basis," it does not offend the Constitution simply because the classification "is not made with mathematical nicety or because in practice it results in some inequality." * * * [at 485, 90 S. Ct. at 1161]
>
> We do not decide today that the Maryland regulation is wise, that it best fulfills the relevant social and economic objectives that Maryland might ideally espouse, or that a more just and humane system could not be devised. Conflicting claims of morality and intelligence are raised by opponents and proponents of almost every measure, certainly including the one before us. But the intractable economic, social, and even philosophical problems presented by public welfare assistance are not the business of this Court. The Constitution may impose certain procedural safeguards upon systems of welfare administration. Goldberg v. Kelly, 397 U.S. 254 [90 S. Ct. 1011, 25 L.

Ed. 2d 287] [1970]. But the Constitution does not empower this Court to second-guess state officials charged with the difficult responsibility of allocating limited public welfare funds among the myriad of potential recipients. [citations omitted] [at 487, 90 S. Ct. at 1162].

See also Richardson v. Belcher, 404 U.S. 78, 92 S. Ct. 254, 30 L. Ed. 2d 231 (November 22, 1971).

In this case, plaintiffs urge that Maryland's Rule 200.X.A.(2) discriminates without rational basis against certain children whose fathers happen to be out of work because of their own misconduct which justified their discharge by their employer, or because of a labor dispute. Plaintiffs stress the need to focus upon the welfare of each child and to disregard other factors such as whether the overall public policy of a state is furthered by denying AFDC-E benefits to children of such fathers. The State of Maryland, relying largely upon Dandridge v. Williams, *supra*, contends that Maryland, through the power granted to it to enact certain standards, on a cooperative basis with the Federal Government, possesses the right to make policy determinations of the type underlying the two applications of Maryland Rule 200.X.A.(2) which are challenged herein, and that it is not up to the courts to question the wisdom of the State of Maryland in so doing. The United States Chamber of Commerce and the state and local Chambers of Commerce, as amici herein, urge this Court to hold the Maryland Rule, denying AFDC-E benefits to children of fathers out of work because of involvement in labor disputes, valid because a contrary rule would be in conflict, under the Supremacy Clause of the Constitution, Article VI, with federal statutes enacted by the Congress in the field of labor relations.[21] The United States Chamber of Commerce unsuccessfully took that same position in

[21] The three Chambers of Commerce take no position with regard to the validity of the Maryland Rule insofar as it denies benefits to children of fathers who are disqualified from receiving Maryland unemployment compensation benefits for reasons other than those relating to stoppage of work because of labor disputes.

ITT Lamp Division v. Minter, 435 F.2d 989 (1st Cir.), cert. denied, 402 U.S. 933, 91 S. Ct. 1526, 28 L. Ed. 2d 868 (1971), pet. for reh. denied 404 U.S. 874, 92 S. Ct. 27, 30 L. Ed. 2d 120, in which the Massachusetts AFDC-E program, which *permits* aid to fathers out of work because of involvement in labor disputes, was held not in conflict with any federal statutes. HEW, in its presentation to this Court, contends that a state is constitutionally permitted to follow both of the two Maryland practices under attack in this case, or practices contrary and opposite thereto. This Court believes that the HEW position is sound.

Dealing first with the constitutional challenge relating to labor disputes, this Court is of the opinion that rational bases exist for Maryland's position denying AFDC-E benefits to children of fathers who are out of work because of labor disputes, just as there are rational reasons for the opposite view which has been adopted by most of the states.[22] Thus, the equal

[22] The State of Maryland, in a memorandum filed in this case, has set forth the following "separate, although somewhat related, bases upon which the Rule may be justified:"

1. To harmonize the State's unemployment compensation program and its AFCD-E program, both such programs being employment programs and both being cut from the same fabric of cooperative federalism woven by the Social Security Act.
2. To discourage voluntary unemployment and thereby to promote employment in the State.
3. In the case of economic strikers, to maintain the largest measure of neutrality in collective bargaining and strikes, so as not to incur the risk of adversely affecting employment in, and the economy of, the State.

HEW has informed this Court that, in addition to Maryland, 22 states currently have AFDC-E programs and that of those 22, one denies benefits to those in need as a result of involvement in labor disputes, two so deny benefits unless the involvement is due to a lockout, two so deny benefits unless the strike in question is "legal," and one is new to the program and HEW has no knowledge as yet concerning that state's plan in this connection. HEW has further written to this Court that "[a]s far as it knows,

protection challenge to Maryland's denial of benefits to such fathers must be rejected.

Nor has the Congress, by the enactment of labor laws having national scope, in any way, by the terms of those statutes or otherwise, indicated that those laws or the policies underlying them are intended to control the resolution of those opposing viewpoints of social welfare which underlie the differences between the Maryland and the contrary rules relating to the grant or denial of AFDC-E benefits to those out of work because of involvement in labor disputes. In *Minter,* 435 F.2d at 992-993, Judge Coffin has written:

> * * * Where Congress has not clearly manifested its purpose to exclude state action which takes the form of exercise of its historic police powers, such state action will not be invalidated under the Supremacy Clause, "in the absence of persuasive reasons", Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142 [83 S. Ct. 1210, 10 L. Ed. 2d 248] (1963), or unless the administration of the state law "palpably infringes" upon the federal policy. Southern Pac. Co. v. Arizona ex rel. Sullivan, 325 U.S. 761, 766 [65 S. Ct. 1515, 89 L. Ed. 1915] (1945). *See also* Head v. New Mexico Bd. of Examiners, 374 U.S. 424 [83 S. Ct. 1759, 10 L. Ed. 2d 983] (1963); Buck v. California, 343 U.S. 99 [72 S. Ct. 502, 96 L. Ed. 775] (1952). [Footnote omitted.]

Judge Coffin's statement, written in the context of labor disputes, would seem equally applicable with regard to the attack under the Supremacy Clause upon

Maryland is the only state" which "conditions eligibility for AFDC-UF [see n. 1 *supra*] on eligibility for unemployment compensation," but that the questionnaire HEW has addressed to the states "did not specifically address itself to such restrictions, and there is, therefore, at least a possibility that similar provisions exist in other state AFDC-UF plans." The State of Maryland has furnished information to this Court which may indicate that at least one other state may not permit strikers to register for the retaining and/or reemployment which is a condition precedent to the grant of AFDC-E benefits.

Maryland's denial of aid to children of fathers discharged from their last employment because of misconduct. And the reasons which require rejection of the equal protection challenge upon denial of aid in connection with labor disputes also dispose of that challenge with regard to loss of work because of gross misconduct. Accordingly, the constitutional challenge stated by plaintiffs is rejected, *in toto.*[23]

IV.

Plaintiffs also contend that the Maryland Rule is in conflict with the federal statute and the HEW regula-

[23] Having so disposed of the consitutional attack, this three-judge court could dissolve itself and return the question of the determination of the alleged conflict between the Maryland Rule and the federal statute and regulation, to the single district judge to whom this case was originally assigned. However, in accordance with the discretion of a three-judge court (which is properly convened to consider a nonfrivolous constitutional challenge) to retain jurisdiction with regard to the non-constitutional issues, this three-judge court, in view of the importance of the issues set forth herein, has determined not to dissolve itself and to reach, as a three-judge court, the nonconstitutional issues presented herein. In Rosado v. Wyman, 397 U.S. *supra* at 403, 90 S. Ct. at 1213, Mr. Justice Harlan, approving the dissolution of a three-judge district court where a constitutional claim had been declared moot, wrote:

> * * * Even had the constitutional claim not been declared moot, the most appropriate course may well have been to remand to the single district judge for findings and the determination of the statutory claim rather than encumber the district court, at a time when district court calendars are overburdened, by consuming the time of three federal judges in a matter that was not required to be determined by a three-judge court.

However, since the holding herein probably renders any further proceedings (see the discussion at p. 371 *infra)* unnecessary and since all three of the members of this three-judge court have participated in the formulation of this opinion, this Court has determined not to dissolve itself and not to remand this case to the single judge to whom the complaint was originally presented. *See also* Woolfolk v. Brown, 325 F. Supp. 1162, 1163 (E.D. Va. 1971); C. Wright, Law of Federal Courts § 50, pp. 190-91 (2d ed. 1970).

tion promulgated thereunder. Analyses of the provisions of 45 C.F.R. § 233.100, on the one hand, and section 6 of the Maryland Unemployment Insurance law, on the other hand, show that all of the Maryland disqualifications are also disqualifications under the federal regulation, other than pregnancy which does not apply to fathers, participation in labor disputes, gross misconduct, discharge or suspension as a disciplinary measure, and voluntarily leaving prior employment.[24] The specific issue which accordingly is presented herein is whether gross misconduct and discharge or suspension as a disciplinary measure, or disqualification because of involvement in a labor dispute, can be made disqualifications in a state's AFDC-E program, without that state violating federal statutory and/or regulatory requirements.

[9-12] It is conceded in this case by respondents that each of the plaintiffs not only qualifies as needy, but also took all steps in accordance with 45 C.F.R. § 233.100, including both application for employment and readiness to take part in retraining, preliminarily necessary to place himself in position to obtain AFDC-E benefits, and that he would have received such benefits had he not, in the case of the plaintiff Wright, been discharged for alleged misconduct, and, in the case of the plaintiff Francis, been out of work because of the strike called by his union. As discussed *infra,* 45 C.F.R. § 233.100(a) provides that "if a State wishes to provide AFDC for children of unemployed fathers the State Plan * * * *must* * * * [*i*]*nclude* a definition of an

[24] HEW, in its memorandum filed in this case, argues that the Maryland Rule 200.X.A. (2), by denying AFDC-E benefits to those disqualified under Maryland's Unemployment Compensation law, "avoids the anomaly of denying" those benefits to those "who receive unemployment insurance benefits while providing" them "to individuals who are disqualified for unemployment insurance benefits because of their own acts." But the answer is that there can reasonably be differences of opinion as to whether such an anomaly exists; further, in any event, Maryland, by neither statute nor rule, can exclude from the beneficiary class under Maryland's AFDC-E program those whom the Congress or the Secretary of HEW have required to be included.

unemployed father * * * which shall include any father" who is employed less than a given number of hours and which may include any father who is employed for a certain number of other hours. Thus, HEW used mandatory language, i.e., that the state plan *must* include any father who is employed less than a given number of hours. There is nothing in the regulation which permits a state plan to deny benefits under the state's AFDC-E program, on the ground that the father of the needy child is unemployed because his discharge from employment was due to his own misconduct. Such a father is clearly not employed. Consequently, Maryland Rule 200X.A. (2), insofar as it attempts to transplant, within the framework of Maryland's AFDC-E program, the disqualification requirements of sections 6(b) and/or (c) of the Maryland Unemployment Compensation law, is violative of HEW's regulation. The fact that HEW has itself, by approving the Maryland plan, given approval to such violation in no way deprives the plaintiff Wright, and others similarly situated, from requiring that the Maryland AFDC-E program be administered in accordance with the HEW regulation. Respondents and HEW urge upon this Court that HEW's approval of the Maryland Rule in question is presumptively valid since (1) the Congress delegated broad rule-making powers to HEW in connection with administering the program, (2) HEW, in promulgating its regulation, left great leeway for each state to determine many details in its own plan,[25] and (3) HEW approved the Maryland Rule. It is true that such approval is entitled to considerable weight by this Court, *see* Rosado v. Wyman, *supra,* 397 U.S. at 406, 90 S. Ct. 1207, 25 L. Ed. 2d 442; King v. Smith, *supra,* 392 U.S. at 334, 88 S. Ct. 2128, 20 L. Ed. 2d 1118 (Douglas, J., concurring); Udall v. Tallman, 380 U.S. 1, 4, 16 and ff., 85 S. Ct. 792, 13 L. Ed. 2d 616

[25] A reading of the text of 45 C.F.R. § 233.100(c) clearly demonstrates that leeway. See Appendix B. The legislative history of 42 U.S.C. § 607 indicates neither the presence nor absence of any congressional intent in connection with disqualification for AFDC-E benefits because of discharge for misconduct.

(1965); Jno. McCall Coal Company, Inc. v. United States, 374 F.2d 689, 692 (4 Cir. 1967), particularly when the Congress has delegated policy-making to the agency. Davis, Administrative Law § 5.05. But, once an administrative agency has promulgated a regulation, even in instances where it is not required to do so, that administrative agency is bound to follow its regulation. United States v. Heffner, 420 F.2d 809 (4th Cir. 1970); United States ex rel. Brooks v. Clifford, 409 F.2d 700 (4th Cir. 1969); Hammond v. Lenfest, 398 F.2d 705 (2d Cir. 1968). *Cf.* Townsend v. Swank, *supra.* That is particularly true where the regulation uses unambiguous, mandatory language. A man out of work because he was discharged for cause by his employer *is unemployed.* There can be no two ways about that conclusion. Accordingly, this Court holds that the disqualification in Maryland's Rule 200.X.A. (2) of fathers who were discharged because of gross misconduct or as a disciplinary measure, is in conflict with 45 C.F.R. § 233.100(a) and that the said Maryland Rule is invalid insofar as that disqualification is concerned.

The wording of 45 C.F.R. § 233.100(a) also requires a similar holding with regard to Maryland's denial of AFDC-E benefits to those out of work because of labor disputes. While the legislative history of 42 U.S.C. § 607 throws little light on the subject,[26] it is contended that the provisions of the statute,[27] which indicate the emphasis Congress placed upon retraining, preclude the payment of AFDC-E benefits to strikers. However, persons out of work because of a labor dispute certainly have been known to find new jobs during the period of the labor dispute and thereafter not to return to the old job. And, in the case at bar, it is stipulated that the plaintiff Francis did apply for a new job and did agree to take part in the required training.[28]

[26] See Appendix D.

[27] See Appendix A.

[28] Nor does the usage of the word "employed" or similar words in other contexts compel any one meaning of the word "unemployment" as used in 42 U.S.C. § 607 or the word "employed" as used in 45 C.F.R. § 233.100(a). The Federal Bureau of Labor Statistics classifies persons out of work because of involvement in labor disputes as "employed persons" rather than "unemployed persons." However, it must be noted that the Bureau classifies some persons who might well be thought by the average person to be unemployed, as neither "employed" nor "unemployed," but rather in the "not in the labor force grouping." An example is persons who are "voluntarily idle." *See* Handbook of Labor Statistics (1970), U. S. Dept. of Labor, Bureau of Labor Statistics Technical Notes, Current Population Survey, pp. 1 & 2. Thus, the Bureau's classifications are not too helpful in the context of this case where it is necessary to decide if claimants for AFDC-E benefits are either employed or unemployed. Under the National Labor Relations Act, a striker continues to have rights to his job and to his employee status. 29 U.S.C. § 152(3). *See also* NLRB v. Mackay Radio & Teleg. Co., 304 U.S. 333, 345, 58 S. Ct. 904, 82 L. Ed. 1381 (1938); Mooresville Cotton Mills v. NLRB, 97 F.2d 959, 961 (4th Cir. 1938). Turning to section 6(e) of the Maryland Unemployment Insurance law, it is noted that the section specifically refers to "unemployment * * * due to a stoppage of work." Thus, the State of Maryland, under that law, classifies those involved in labor disputes as unemployed; however, it then disqualifies such persons from collecting unemployment compensation.

[13-15] In King v. Smith, *supra,* the Supreme Court analyzed the purposes of the AFDC program and concluded that the Alabama regulation, which, the State of Alabama contended, was intended to discourage immorality and illegitimacy and also to avoid unfairly penalizing families where an official marital relationship existed, was inconsistent with the statute on the ground that Congress intended to include in the category of the word "parent" a person who had a legal obligation to support the child in question. With regard to the immorality point, the Supreme Court, 392 U.S. at 324-325, 88 S. Ct. at 2137, stated that federal public welfare policy "now rests on a basis considerably more sophisticated and enlightened than the 'worthy person' concept of earlier times. * * * In sum, Congress has determined that immorality and illegitimacy should be dealt with through rehabilitative measures. . . ." Thus, the Supreme Court, in King v. Smith, found that the justifications which the State of Alabama offered were

incompatible with the federal congressional purpose. In this case, the State of Maryland, and the Chambers of Commerce, particularly the national Chamber of Commerce, strenuously urge this Court to hold that the Congress has clearly indicated, through its labor legislation, and in other ways that it did not intend to lend governmental support to those out of work because of labor disputes and that therefore the word "unemployment," as used in the statute and defined in the regulation by HEW, should be read to exclude such persons. The difficulty with that approach is that it is a boot strap one because there is little or nothing in the legislative history, or in the words of the statute itself, or in the words of the regulation, or indeed in the advice received by this Court from HEW, to indicate whether the word "unemployment," as used in the statute and amplified in the regulation, was or was not intended to include such persons. Perhaps it is in recognition of that fact that HEW would have us go both ways and say that the Congress empowered HEW to leave to each participating state — and that HEW in turn by its regulation has left to each state — the determination of whether the word "unemployment," in the context of a state's own AFDC-E program, includes or excludes such persons. In support of that view, it is to be noted that when Congress removed the parenthetical words "as defined by the State," and substituted the words "as determined in accordance with standards prescribed by the Secretary," Congress did not simply substitute the words "as determined by the Secretary." Thus, Congress used words which did not mandatorily require the Secretary to require each state to adopt the same meaning of the word "employment" but instead merely *authorized* the Secretary to prescribe a national meaning if the Secretary so desired. In so doing, this Court agrees that the Congress empowered the Secretary, by regulation, to require each participating state (1) to include or (2) to exclude from its respective AFDC-E program those out of work because of involvement in labor disputes, or (3) to leave that decision to each state. A quick look at 45 C.F.R. § 233.100(a) (1) (ii) reveals a specific instance in which each state is given the power

of definition by the Secretary.[28a] Thus, the Secretary demonstrated that he knew exactly how to state clearly when he desired to leave a matter to the discretion of each state. By contrast, the language of 45 C.F.R. § 233.100(a) (1) (i) is crystal clear, i.e., "* * * the State Plan * * * *must* * * * *include a definition* of an employed father * * *, which *shall* include a father who is *employed less than* 30 hours a week [amended effective October 1, 1971 to be "100 hours per month"] *or less* than three quarters of a number of hours considered by the industry to be full time for the job, whichever is less * * *." (Emphasis added). The presence of those words renders the Secretary's regulation incapable of being construed in more than one of the three ways left open to the Secretary by the Congress. A father who is not working at all because of his involvement in a labor dispute is a father who "is employed less than 30 hours a week" and less than three quarters of his industry's average. Whether the word "unemployment" covers or does not cover persons out of work because of labor disputes, the Secretary, acting under the authority delegated to him by the Congress, mandatorily, by the unequivocal words of his own regulation, required that each state's plan must include all fathers, who otherwise qualify, who *are employed less* than a given number of hours. In order otherwise to qualify, such a father must not have available to him from his own resources or other sources including strike benefits assets or income which place him outside of the needy category. Further, he must register for other work and for retraining and accept and participate in both in good faith. Considered in their sum total, the statute and the regulations provide safeguards to ensure that only needy fathers who are willing to be retrained if necessary, and to engage in other employment, can qualify for benefits which are made available primarily to help the children of such fathers. In Townsend v. Swank, *supra,* in which the Supreme Court held invalid that part of Illinois' AFDC program under which certain needy dependent children attending high school or vocational school

[28a] See Appendix B.

were eligible for benefits, but those attending college or university were not, Mr. Justice Brennan (at p. 505 of 92 S. Ct.) wrote:

> Thus King v. Smith establishes that, at least in the absence of congressional authorization for the exclusion clearly evidenced from the Social Security Act or its legislative history, a state eligibility standard that excludes persons eligible for assistance under federal AFDC standards violates the Social Security Act and is therefore invalid under the Supremacy Clause. We recognize that regulations of the Department of Health, Education, and Welfare seem to imply that States may to some extent vary eligibility requirements from federal standards. However, the principle which accords substantial weight to interpretation of a statute by the department entrusted with its administration is inapplicable insofar as those regulations are inconsistent with the requirement of § 402(a) (10) that aid be furnished "to *all eligible* individuals." (Emphasis supplied.) King v. Smith, 392 U.S. at 333 n. 34. [88 S. Ct. 2128, 20 L. Ed. 2d 1118] [Footnote omitted.]

The following paraphrase of Mr. Justice Brennan's last-quoted sentence controls this case as to those involved in labor disputes: The principle which accords substantial weight to an agency's interpretation of its own regulation is inapplicable insofar as that interpretation is inconsistent with the requirements (in this case, mandatory requirements) of its own regulation validly promulgated under authority delegated to it by the Congress.[29] The Secretary could have authorized Maryland to exclude from AFDC-E benefits those out of work because of labor disputes. But, by regulation, the Secretary mandatorily required the opposite, and having so done, he may not ignore his own regulation. Accordingly, this Court holds that Maryland's Rule 200.X.A. (2), insofar as it denies AFDC-E benefits to those out of work because of involvement in labor

[29] *See also* Heffner v. United States, *supra;* United States ex rel. Brooks v. Clifford, *supra;* Hammond v. Lenfest, *supra.*

disputes, conflicts with the federal regulatory requirements promulgated by the Secretary, and that the plaintiff Francis and others similarly situated are entitled to relief herein.

[16] It follows from our conclusion that Maryland's program, insofar as Maryland fails to afford AFDC-E relief where fathers are out of work because of gross misconduct on because of involvement in labor disputes, is incompatible with federal regulatory requirements, and that the plaintiff Wright and others similarly situated and the plaintiff Francis and others similarly situated "are entitled to declaratory relief and an appropriate injunction by [this Court] against the payment of *federal* monies" in contravention of this Court's holding here, "should the State not develop a conforming plan within a reasonable period of time," Rosado v. Wyman, 397 U.S. *supra* at 420, 90 S. Ct. at 1222 (emphasis by Mr. Justice Harlan). This Court, having confidence that, if this Court's holdings herein become final, the State of Maryland will conform its plan, effective as of the date of the filing of this opinion and as required by this Court's declaration of the law herein, finds it unnecessary, at this time, to enjoin or otherwise issue any order to respondents herein.[29a]

V.

Maryland is required to disperse whatever public funds are available for AFDC-E benefits in accordance with this opinion. Rosado v. Wyman, *supra.*[30] *See*

[29a] The said obligations of the State of Maryland hereunder with regard to the labor involvement issue will of course be different if, forthwith, after the filing of this opinion, the Secretary of HEW amends 45 C.F.R. § 233.100(a) in accordance with the discretionary authority conferred upon him by, and within the confines of, 42 U.S.C. § 607 as construed in this opinion.

[30] Mr. Justice Harlan, in Rosado (at 420-421, 90 S. Ct. at 1222) wrote:

> We have considered and rejected the argument that a federal court is without power to review state welfare provisions or prohibit the use of federal funds by the States in view of the fact that Congress has lodged in the

Henry v. Betit, 323 F. Supp. 418, 421 (D. Alaska 1971); Dews v. Henry, 297 F. Supp. 587-592 (D. Ariz. 1969). But there remains the question of whether the plaintiff Wright and the plaintiff Francis and others respectively similarly situated are entitled to be paid AFDC-E benefits not only prospectively from and after the date of the filing of this opinion, but retroactively. In Westberry v. Fisher, 309 F. Supp. 12 (D. Maine 1970), upon remand by a three-judge court to him as a single judge for determination of damage claims, Judge Gignoux was faced with a claim for retroactive AFDC benefits withheld during the period from the date of the filing of the complaint by the plaintiffs in that case, in which a class was established under Federal Civil Rule 23. Judge Gignoux held the defendants, who were state officials, not personally liable for damages under 42 U.S.C. § 1983, since those officials had acted "in good faith in performance of their official duty as they understood it." 309 F. Supp. *supra* at 18. In this case, there are no allegations that any of the defendant state officials did not perform their official duty in good faith as they understood that duty. While state officials are

Department of HEW the power to cut off federal funds for noncompliance with statutory requirements. We are most reluctant to assume Congress has closed the avenue of effective judicial review to those individuals most directly affected by the administration of its program. Cf. Abbott Laboratories v. Gardner, 387 U.S. 136 [87 S. Ct. 1507, 18 L. Ed 2d 681] (1967); Association of Data Processing Service Organizations v. Camp, 397 U.S. 150, [90 S. Ct. 827, 25 L. Ed. 2d 184] (1970); Barlow v. Collins, 397 U.S. 159 [90 S. Ct. 832, 25 L. Ed. 2d 192] (1970). We adhere to King v. Smith, 392 U.S. 309 [88 S. Ct. 2128, 20 L. Ed. 2d 1118] (1968), which implicitly rejected the argument that the statutory provisions for HEW review of plans should be read to curtail judicial relief and held Alabama's "substitute father" regulation to be inconsistent with the federal statute. While King did not advert specifically to the remedial problem, the unarticulated premise was that the State had alternative choices of assuming the additional cost of paying benefits to families with substitute fathers or not using federal funds to pay welfare benefits according to a plan that was inconsistent with federal requirements.

liable under section 1983, under the doctrine of Monroe v. Pape, 365 U.S. 167, 81 S. Ct. 473, 5 L. Ed. 2d 492 (1961), and although Pierson v. Ray, 386 U.S. 547, 554, 87 S. Ct. 1213, 1218, 18 L. Ed. 2d 288 (1967), only goes so far as to say that Congress, in enacting section 1983, did not intend "to abolish wholesale all common-law immunities," and while the Supreme Court "has not definitively spoken on the applicability of the doctrine of governmental immunity" [31] in actions brought under section 1983 against state administrative officials, this Court, as did Judge Gignoux, adopts Judge Magruder's views as expressed in Cobb v. City of Malden, 202 F.2d 701 (1st Cir. 1953), and in Francis v. Lyman, 216 F.2d 583 (1st Cir. 1954). In the latter case, Judge Magruder concluded (at 588) that while "it is no defense to the state officials that they may have acted, not maliciously, but in the good-faith belief that they were performing their official duty under what they thought was valid state legislation" where they are dealing with problems of race discrimination, and may therefore be "said to act at their peril" in such situations, nevertheless, in other situations, "it seems to be the tendency of the decisions to restrict the application of the Civil Rights Act so as to avoid the appalling inflammation of delicate state-federal relationships which undoubtedly would ensue." *See also* the citations in Westberry v. Fisher, 309 F. Supp. *supra* at 17, of the opinions of other courts and writers written both before and after the Supreme Court's pronouncements in *Pierson*, which have followed Judge Magruder's approach, and the observation of Professor Davis that Judge Magruder's approach "seems likely to control the law of the future." 3 Davis, Administrative Law § 26.06, pp. 478-479 (1958).

[17] To the extent plaintiffs seek to hold defendants herein liable for damages under section 1983 in their official capacities as officers of the State of Maryland, "such a suit is in actuality one against the State, even though the State is not named as a defendant."[32]

[31] 309 F. Supp. *supra* at 16.

[32] Suits seeking injunctions against state officials who are attempting to enforce state statutes allegedly violative of the Federal Constitution fall into different classifications. Griffin

Westberry v. Fisher, *supra,* 309 F. Supp. at 18, and cases cited thereat. *See also* O'Neill v. Early, 208 F.2d 286, 289 (4th Cir. 1953).

[18] Approaching the case as one against the State, all claims herein for damages must fail. In the first place, the State is not a person within the meaning of section 1983. Monroe v. Pape, *supra,* 365 U.S. at 187-192, 81 S. Ct. 473, 5 L. Ed. 2d 492; Hewitt v. City of Jacksonville, 188 F.2d 423 (5th Cir.), cert. denied, 342 U.S. 835, 72 S. Ct. 58, 96 L. Ed 631 (1951); Westberry v. Fisher, *supra,* 309 F. Supp. at 18.

[19, 20] In the second place, the Eleventh Amendment[33] not only bars, without the consent of a state, a federal court suit against that state by citizens of another state, but also by citizens of its own state. Great Northern Life Insurance Co. v. Read, 322 U.S. 47, 51, 64 S. Ct. 873, 88 L. Ed. 1121 (1944); Hans v. Louisiana, 134 U.S. 1, 10 S. Ct. 504, 33 L. Ed. 842 (1890); Westberry v. Fisher, *supra,* 309 F. Supp. at 18. In this case, the defendants, speaking on behalf of the State of Maryland, have not only not waived that bar but indeed vigorously press it. Thus, at the very least, as Judge Winter wrote in Williams v. Dandridge, 297 F. Supp. 450, 452 n. 1, 469 (D. Md. 1968), the Eleventh Amendment does not permit this Court to require the State of Maryland to appropriate additional money to pay AFDC-E claims which would have been presented to and paid by the State of Maryland in years prior to the current fiscal year but for the disqualifying

v. County School Bd. of Prince Edward County, 377 U.S. 218, 228, 84 S. Ct. 1226, 12 L. Ed. 2d 256 (1964); Georgia R.R. & Banking Co. v. Redwine, 342 U.S. 299, 304, 72 S. Ct. 321, 96 L. Ed. 335 (1952); Ex Parte Young, 209 U.S. 123, 28 S. Ct. 441, 52 L. Ed. 714 (1908). *See* Rosado v. Wyman, *supra* 397 U.S. at 420, 90 S. Ct. 1207, 25 L. Ed. 2d 442.

[33] The Eleventh Amendment to the Constitution of the United States provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

provision of Maryland Rule 200.X.A. (2).[34] Additionally, this Court holds that the Eleventh Amendment, when asserted on behalf of the State as it is herein, precludes this Court from requiring payment of any such claims which have arisen, during the State's current fiscal year which commenced July 1, 1971, prior to the date of the filing of this opinion.[35] In so holding, this Court has scruntinized a number of cases in which monetary payments by states, relating to the past, have been required by federal courts. *See* the cases cited and the discussion of several of them in Westberry v. Fisher, 309 F. Supp. *supra* at 15, n. 5, 19, 20 n. 12. *See also* Doe v. Swank, 332 F. Supp. 61 (N.D. Ill. 1971); Grubb v. Sterrett, 315 F. Supp. 990 (N.D. Ind.), aff'd, 400 U.S. 922, 91 S. Ct. 187, 27 L. Ed. 2d 182 (1970); Doe v. Harder, 313 F. Supp. 575 (D. Conn.), app. dismissed, 399 U.S. 902, 90 S. Ct. 2202, 26 L. Ed. 2d 557 (1970); Brooks v. Yeatman, 311 F. Supp. 364 (M.D. Tenn. 1970), which have been decided since *Westberry.* But in most of these cases, the Eleventh Amendment problem was apparently either not raised or not faced. And in none of them has any satisfactory reason been advanced for voiding the bar of the Eleventh Amendment.

Whether retroactive payments are required under any HEW and/or Maryland regulations dealing with the subject of "corrected payments," *see* Grubb v. Sterrett, *supra,* 315 F. Supp. at 995; Westberry v. Fisher, *supra,* 309 F. Supp. at 20-21; Robinson v. Washington, 302 F. Supp. 842, 844 (D.D.C. 1968); and Solman v. Shapiro, 300 F. Supp. 409, 416 (D. Conn. 1969), poses a question which has not been fully briefed or argued in this case. For that reason and, even more importantly, because this Court has confidence that if this Court's holding herein becomes final, both HEW and the State of Maryland will take such steps, if any, as are required by their respective regulations in connection with the making of retroactive payments, this Court, at this

[34] Unless perhaps in connection with regulations of HEW and/or the State of Maryland as to which this Court expresses no opinion herein. See the discussion at p. 371 in the body of this opinion.

[35] See n. 34 *supra.*

time, does not believe it necessary or advisable to state any position or comment further in connection therewith, including whether or not the Eleventh Amendment bar has been lowered by any express or implicit undertaking by Maryland in connection with its acceptance of federal funds. If further developments lead any of the parties to believe that they are entitled to any relief in this Court with regard to the failure of either HEW and/or any Maryland or local administrative agency to make retroactive payments in accordance with its own regulations, further application for such relief may be timely made to this Court under such circumstances.

For the reasons set forth in this opinion, this Court holds that each of the plaintiffs and others respectively similarly situated are entitled to prospective relief only, but that, at least at this time, no decree or order would appear necessary to effectuate that prospective relief.[36]

It is so decreed and ordered.

APPENDIX A

42 U.S.C. § 607, as amended in 1968, provides:

§ 607. *Dependent children of unemployed fathers; definition*

(a) The term "dependent child" shall, notwithstanding section 606(a) of this title, include a needy child who meets the requirements of section 606(a) (2) of this title, who has been deprived of parental support or care by reason of the umemployment (as determined in accordance with standards prescribed by the Secretary) of his father, and who is living with any of the relatives specified in section 606(a) (1) of this title in a place of residence maintained by one or more of such relatives as his (or their) own home.

(b) The provisions of subsection (a) of this section shall be applicable to a State if the State's plan approved under section 602 of this title—

[36] See the discussion at p. 369 n. 30 *supra*, adopting Mr. Justice Harlan's approach in Rosado v. Wyman, *supra*.

(1) requires the payment of aid to families with dependent children with respect to a dependent child as defined in subsection (a) of this section when—

(A) such child's father has not been employed (as determined in accordance with standards prescribed by the Secretary) for at least 30 days prior to the receipt of such aid,

(B) such father has not without good cause, within such period (of not less than 30 days) as may be prescribed by the Secretary, refused a bona fide offer of employment or training for employment, and

(C) (i) such father has 6 or more quarters of work (as defined in subsection (d) (1) of this section) in any 13-calendar-quarter period ending within one year prior to the application for such aid or (ii) he received unemployment compensation under an unemployment compensation law of a State or of the United States, or he was qualified (within the meaning of subsection (d) (3) of this section) for unemployment compensation under the unemployment compensation law of the State, within one year prior to the application for such aid; and

(2) provides—

(A) for such assurances as will satisfy the Secretary that fathers of dependent children as defined in subsection (a) of this section will be referred to the Secretary of Labor as provided in section 602(a) (19) of this title within thirty days after receipt of aid with respect to such children;

(B) for entering into cooperative arrangements with the State agency responsible for administering or supervising the administration of vocational education in the State, designed to assure maximum utilization of available public vocational education services and facilities in the State in order to encourage the retraining of individuals capable of being retrained; and

(C) for the denial of aid to families with dependent children to any child or relative specified in subsection (a) of this section—

(i) if, and for so long as, such child's father is not currently registered with the public employment offices in the State, and

(ii) with respect to any week for which such child's father receives unemployment compensation under an unemployment compensation law of a State or of the United States.

(c) Notwithstanding any other provisions of this section, expenditures pursuant to this section shall be excluded from aid to families with dependent children (A) where such expenditures are made under the plan with respect to any dependent child as defined in subsection (a) of this section, (i) for any part of the 30-day period referred to in subparagraph (A) of subsection (b) (1) of this section, or (ii) for any period prior to the time when the father satisfies subparagraph (B) of such subsection, and (B) if, and for as long as, no action is taken (after the 30-day period referred to in subparagraph (A) of subsection (b) (2) of this section), under the program therein specified to refer such father to the Secretary of Labor pursuant to section 602(a) (19) of this title.

(d) For purposes of this section—

(1) the term "quarter of work" with respect to any individual means a calendar quarter in which such individual received earned income of not less than $50 (or which is a "quarter of coverage" as defined in section 443(a) (2) of this title), or in which such individual participated in a community work and training program under section 609 of this title or any work and training program subject to the limitations in section 609 of this title or the work incentive program established under part C;

(2) the term "calendar quarter" means a period of 3 consecutive calendar months ending on March 31, June 30, September 30, or December 31; and

(3) an individual shall be deemed qualified for unemployment compensation under the State's unemployment compensation law if—

(A) he would have been eligible to receive such unemployment compensation upon filing application, or

(B) he performed work not covered under such law and such work, if it had been covered, would (together with any covered work he performed) have made him eligible to receive such unemployment compensation upon filing application.

APPENDIX B

45 C.F.R. § 233.100(a), as promulgated in 1969, provides:

§ 233.100 *Dependent children of unemployed fathers.*

(a) *Requirements for State Plans.* If a State wishes to provide AFDC for children of unemployed fathers, the State plan under Title IV—Part A of the Social Security Act must, except as specified in paragraph (b) of this section:

(1) Include a definition of an unemployed father

(i) Which shall include any father who is employed less than 30 hours a week, or less than three fourths of the number of hours considered by the industry to be full time for the job, whichever is less, and

(ii) Which may include any father who is employed less than 35 hours a week, or less than the number of hours considered by the industry to be full time for the job, whichever is less.

(2) Include a definition of a dependent child which shall include any child of an unemployed father (as defined by the State pursuant to subparagraph (1) of this paragraph) who would be, except for the fact that his parent is not dead, absent from the home, or incapacitated, a dependent child under the State's plan approved under section 402 of the Act.

(3) Provide for payment of aid with respect to any dependent child (as defined by the State pursuant to subparagraph (2) of this paragraph) when the conditions set forth in subdivisions (i) (ii), and (iii) of this subparagraph are met:

(i) His father has been unemployed for at least 30 days prior to the receipt of such aid.

(ii) Such father has not without good cause, within such 30-day period prior to the receipt of such aid, refused a bona fide offer of employment or training for employment. Before it is determined that a father has refused a bona fide offer of employment or training for employment without good cause, the agency must make a determination that such an offer was actually made. (In the case of offers of employment made through the public employment or manpower agencies, the determination as to whether the offer was bona fide, or whether there was good cause to refuse it, will be made by that office or agency.) The father must be given an opportunity to explain why such offer was not accepted. Questions with respect to the following factors must be resolved:

(a) That there was a definite offer of employment at wages meeting any applicable minimum wage requirement and which are customary for such work in the community;

(b) Any questions as to the father's inability to engage in such employment for physical reasons or because he has no way to get to or from the particular job; and

(c) Any questions of working conditions, such as risks to health, safety, or lack of workman's compensation protection.

(iii) Such father (a) has six or more quarters of work (as defined in subdivision (iv) of this subparagraph), within any 13-calendar-quarter period ending within 1 year prior to the application for such aid, or (b) within such 1-year period, received unemployment compensation under an unemployment compensation law of a State or of the United States, or was qualified under the terms of subdivision (v) of this subparagraph) for such compensation under the State's unemployment compensation law.

(iv) A "quarter of work" with respect to any individual means a period (of 3 consecutive calendar months

ending on March 31, June 30, September 30, or December 31) in which he received earned income of not less than $50 (or which is a "quarter of coverage" as defined in section 213(a) (2) of the Act), or in which he participated in a community work and training program under section 409 of the Act or any other work and training program subject to the limitations in such section 409, or the work incentive program established under part C of title IV of the Act.

(v) An individual shall be deemed "qualified" for unemployment compensation under the State's unemployment compensation law if he would have been eligible to receive such benefits upon filing application, or he performed work not covered by such law which, if it had been covered, would (together with any covered work he performed) have made him eligible to receive such benefits upon filing application.

(4) Provide for entering into cooperative arrangements with the State agency responsible for administering or supervising the administration of vocational education to assure maximum utilization of available public vocational education services and facilities in the State to encourage the retraining of individuals capable of being retrained.

(5) Provide for the denial of such aid to any such dependent child or the relative specified in section 406(a) (1) of the Act with whom such child is living,

(i) If, and for as long as, such child's father is not currently registered with the public employment offices in the State, and

(ii) With respect to any week for which such child's father receives unemployment compensation under an unemployment compensation law of a State or of the United States.

(6) Provide that within 30 days after the receipt of aid with respect to such children, such unemployed fathers will be referred for participation in the Work Incentive Program, as provided in section 402(a) (19) of the Act and the regulations relating thereto.

(7) Provide, where application for aid with respect to a dependent child (as defined by the State pursuant to subparagraph (2) of this paragraph) is made within 6 months after the effective date of the modification of the State plan in accordance with the provisions in subparagraphs (1) through (6) of this paragraph, that the father of such child will be considered to have met the requirements of subparagraph (3) (iii) of this paragraph if he met such requirements at any time after April 1961 and prior to the date of such application.

(8) Provide, if the approved State plan in effect prior to January 1, 1968, including aid with respect to dependent children of unemployed parents, that for purposes of subparagraph (7) of this paragraph an individual who received such aid under such plan for the last month ending before the effective date of the modification referred to in subparagraph (7) of this section will be considered to have filed application for aid under the plan as modified on the day after such effective date.

APPENDIX C

Md. Ann. Code art. 95A, § 6 provides, in part:

§ 6. *Disqualification for benefits.*

An individual shall be disqualified for benefits—

(a) *Voluntarily leaving work.* * * *

(b) *Gross misconduct.*—For any week in which his unemployment is due to his having been discharged for gross misconduct connected with his work, if so found by the Executive Director. Such disqualification shall continue until such individual has become reemployed and has earnings therein equal to at least ten (10) times his weekly benefit amount. For the purposes of this article, the term "gross misconduct" shall include conduct of an employee which is (1) a deliberate and willful disregard of standards of behavior, which his employer had a right to expect, showing a gross indifference to the employer's interest, or (2) a series of

repeated violations of employment rules proving that the employee has regularly and wantonly disregarded his obligations. Misconduct not falling within this definition shall not be considered gross misconduct.

(c) *Discharge or suspension as a disciplinary measure.* * * *

(d) *Failure to apply for or accept work; determination of suitable work.* * * *

(e) *Stoppage of work because of labor disputes.*—For any week with respect to which the Executive Director finds that his unemployment is due to a stoppage of work, other than a lockout, which exists because of a labor dispute at the factory, establishment, or other premises at which he is or was last employed, provided that this subsection shall not apply if it is shown to the satisfaction of the Executive Director that—

(1) He is not participating in or financing or directly interested in the labor dispute which caused the stoppage of work; and

(2) He does not belong to a grade or class of workers of which, immediately before the commencement of the stoppage, there were members employed at the premises at which the stoppage occurs, any of whom are participating in or financing or directly interested in the dispute; provided, that if in any case separate branches of work which are commonly conducted as separate businesses in separate premises are conducted in separate departments of the same premises, each such department shall, for the purposes of this subsection, be deemed to be a separate factory, establishment, or other premises.

(f) *Pregnancy.* * * *

(g) *Benefits under law of another state or of the United States.* * * *

(h) *Remuneration from pensions.* * * *

(i) *Dismissal payment or wages in lieu of notice.* * * *

APPENDIX D

The following excerpts from the legislative history of 42 U.S.C. § 607 would appear relevant:

In his message proposing AFDC-E legislation, President Kennedy stated:

> Under the aid to dependent children program, needy children are eligible for assistance if their fathers are deceased, disabled, or family deserters. In logic and humanity, a child should also be eligible for assistance if his father is a needy unemployed worker — for example, a person who has exhausted unemployment benefits and is not receiving adequate local assistance. Too many fathers, unable to support their families, have resorted to real or pretended desertion to qualify their children for help. Many other fathers are prevented by conscience and love of family from taking this route, thereby disqualifying their children under present law.
>
> I recommend that the Congress enact an interim amendment to the aid to dependent children program to include the children of the needy unemployed. Temporary action is recommended pending completion of a study of a permanent program to aid needy children and certain other groups now excluded from the Federal-State public assistance programs. [President's Message to Congress on Program for Economic Growth and Recovery, U.S. Code Cong. & Admin. News 1961, 87th Cong., 1st Sess., p. 1032.]

During the hearings before the House Committee on Ways and Means, the following colloquy between Mr. John W. Tramburg, of the American Public Welfare Association, and Representative Byrnes, a co-sponsor of the bill and ranking minority Committee member, occurred:

> Mr. Byrnes. Well, let me put it this way. I would take it that you do not believe that we should have a test of suitability of employment as a factor in determining whether the person is involuntarily unemployed, when it comes to the relief program?

> Mr. Tramburg. It seems to me that if there is a job available within the reasonable limits of his physical and mental capacities, and if he is drawing assistance and the expense of the assistance programs, we would certainly be within reasonable rights it seems to me to expect that even if it were only temporary until something else opened, he should take it. [Hearings on H.R. 3865 before the House Committee on Ways and Means, 87th Cong., 1st Sess., p. 241 (1961).]

When the bill was being debated in the House, Representative Byrnes stated:

> What the legislation does is to add the new category which says that if the breadwinner is able to work and if he is involuntarily unemployed and no work is available, we will treat that family in the same manner we treat the family when the breadwinner is dead, absent or incapacitated.
>
> I recognize, and I think the committee recognizes, that as we move into this category of involuntarily unemployed people, we do have an additional problem, namely, the determination of whether it is really involuntary unemployment. In the case of the disabled breadwinner, you can test that readily. In the case of his absence from the home, you can test that and determine whether for a fact that situation exists. The death of the breadwinner is a certainty. But here we do get the problem of determining whether, in fact, this person is involuntarily unemployed and I put the emphasis on the word "involuntary."
>
> If you will look at the Bill on page two, you will find the additions made by the committee to assure that aid would only go to children of the involuntarily unemployed beginning at line nine, page two, and going through to page three. That was added by the committee to try to assure that we will not be giving this relief to people who in a sense may be more or less voluntarily unemployed and who are refusing work. I think it is appropriate that this legislation is enacted on a temporary

basis so that we can see how it is administered by the States and those in charge of the program with respect to the determination of whether or not the people who receive this aid or the families who receive this aid are in a situation where the breadwinner is truly, in fact, involuntarily unemployed. I would serve notice on the Department here and now that if I am around in 1962 when this program expires, I certainly am going to want and demand detailed information as to how that aspect of the program has been administered. I think they should be in a position and should recognize now that the Committee will want to know how this aspect of the program has been administered and how it has worked. [107 Cong. Rec. 3528 (daily ed. March 10, 1961).]

Again, during the House Debate, Congressman Byrnes referred to the provisions of a section of the bill which "assure that aid would only go to children of the involuntarily unemployed * * *." 107 Cong. Rec. 3528.

But, on the same day during that debate, in answer to the question of Representative Domonick, Chairman Mills, of the House Ways and Means Committee, stated that states could, if they wished, grant AFDC benefits to strikers. 107 Cong. Rec. 3526 (daily ed. March 10, 1961).

The Report of the Senate Committee on Finance (87th Cong., 1st Sess., p. 3 (1961) stated:

> Your committee's bill, as does the House-passed bill requires that a State agency administering the expanded aid to dependent children program must enter into cooperative arrangements with the State agency administering the public employment offices looking toward the employment of the unemployed parents of the children receiving aid. The arrangements which the State public assistance agency will need to have with the employment service must include provisions for appropriate registration for work and periodic reregistration of the unemployed parent of a child and for otherwise making maximum utilization of

> the job placement services and other services and facilities of the employment office. The purpose of this provision is, so far as possible, to secure employment for the unemployed person in any jobs that may be available which there is not good cause for him to refuse as determined by the State.
>
> Your committee believes that an unemployed individual whose family is receiving aid under this program should accept any reasonable offer of employment. Accordingly, the bill would require that a State plan include provisions to assure that aid is not provided if, and for as long as, the unemployed parent refuses without good cause to accept employment in which he is able to engage. Considerable latitude would be left to the State in determining the period during which assistance would be denied. It is not intended to permanently disqualify the family during subsequent periods when no offer of employment is available. The state would determine whether the parent had good cause for refusing an offer of employment.

In 1967, speaking before the Senate Committee on Finance in connection with the pending amendments, Mr. Wilbur Cohen, then Under Secretary of HEW and later to become HEW Secretary, stated:

> Well, I would say, Senator, that in view of the fact that the Federal Government is spending several billion dollars in Federal funds in the welfare program, we should give priority to a total program of work and making people independent, people that are on the welfare rolls. That is a cost to the general taxpayer. These are people who the general taxpayer is supporting and to the maximum extent that it is feasible, priority should be given to helping the States and the localities have a total program in which work is a central part. . . . [Hearings on HR 1208, before the Senate Committee on Finance, 90th Cong., 1st Sess., p. 264 (1967).]

In 1967, when the House Ways and Means Committee proposed what eventually became the amendments to 42 U.S.C. § 607, its report stated with regard thereto:

> A major characteristic of the law is the authority left to the States to define "unemployment." Your committee believes that this has worked to the detriment of the program because of the wide variation in the definitions used by the States. In some instances, the definitions have been very narrow so that only a few people have been helped. In other States, the definitions have gone beyond anything that the Congress originally envisioned. Your committee's bill is designed to correct this situation and to make other improvements in the program.
>
> The overall objective of the amendments proposed by the Committee is to authorize a Federal definition of unemployment by the Secretary (but within certain limits set forth in the legislation), to tie the program more closely to the work and training program authorized by the bill, and to protect only the children of unemployed fathers who have had a recent attachment to the work force. With these changes, the committee recommends that the program become a permanent part of the Social Security Act, still on an optional basis with the States. [H.R. Rep. No. 544, 90th Cong., 1st Sess., pp. 107-08 (1967). *See also* S. Rep. No. 744, 90th Cong., 1st Sess., p. 160 (1967), U.S. Code Cong. & Admin. News 1967, p. 2834.]

In a July 8, 1969 message to Congress, President Nixon stated that "a worker who exercises his right to strike is not involuntarily unemployed" (115 Cong. Rec. 1853 (1969)).

MEMORANDUM AND ORDER

In The United States District Court
For The District of Maryland

Civil No. 71-853-K

Robert Francis, etc., et al.
v.
Rita C. Davidson, etc., et al.

Plaintiffs have filed herein, on February 9, 1972, a Motion for Immediate and Final Injunctive Relief and also, apparently in connection with said motion, interrogatories addressed to the defendant Rita C. Davidson. Counsel have also suggested that the failure of this Court clearly to grant or deny injunctive relief might be the cause of confusion if either party desired to appeal. *See Gunn v. University Committee to End War in Viet Nam,* 399 U.S. 383 (1970); *Mitchell v. Davidson,* 398 U.S. 42 (1970).

At page 34 of the opinion filed in this Court on January 28, 1972, the following sentence appears:

> This Court, having confidence that, if this Court's holdings herein become final, the State of Maryland will conform its plan, effective as of the date of the filing of this opinion and as required by this Court's declaration of the law herein, finds it unnecessary, at this time, to enjoin or otherwise issue any order to respondents herein.

The above-quoted sentence on page 34 is hereby changed to read as follows, effective as of the date of this Memorandum and Order:

> This Court has confidence that if no appeal is taken from this Court's opinion, or, if an appeal is

taken, then if this Court's opinion is affirmed on appeal, the State of Maryland will conform its plan, effective as of the date of the filing of this Court's opinion, namely, January 28, 1972, as required by this Court's declaration of the law herein, without any injunction being issued by this Court. Therefore, this Court hereby denies, at this time, plaintiffs' request for an injunction herein. *Cf. Gunn v. University Committee to End War in Viet Nam,* 399 U.S. 383 (1970); *Mitchell v. Davidson,* 398 U.S. 42 (1970).

The Motion for Immediate and Final Injunctive Relief, referred to hereinabove, is hereby denied. The interrogatories addressed to the defendant Rita C. Davidson, in connection with said motion, need not be answered by the said defendant. If the State of Maryland does not forthwith conform its plan at the expiration of the appeal period, if no appeal is taken, or, if an appeal is taken, after affirmance on appeal of this Court's opinion in this case, in accordance with this Court's opinion, the plaintiffs may, at that time, reapply to this Court for injunctive relief.

It is So Ordered, this 23rd day of February, 1972.

HARRISON L. WINTER,
United States Circuit Judge,
FRANK A. KAUFMAN,
United States District Judge,
JOSEPH H. YOUNG,
United States District Judge.

MEMORANDUM AND ORDER
(Filed March 1, 1972)

In The United States District Court
For The District of Maryland

Civil No. 71-853-K

Robert Francis, etc., et al.
v.
Rita C. Davidson, etc., et al.

Footnote 15 on page 8 of the opinion filed in this case on January 28, 1972 is hereby amended, effective as of the date of January 28, 1972, by striking the period at the end of that footnote and adding the following words: "except administrative review. Defendants concede that the pursuit of administrative review would have been, and remains as of this date, futile."

It is So ORDERED, this 1st day of March, 1972.

HARRISON L. WINTER,
United States Circuit Judge,
FRANK A. KAUFMAN,
United States District Judge,
JOSEPH H. YOUNG,
United States District Judge.

ORAL OPINION OF THE COURT
(March 1, 1972)

In The United States District Court
For The District of Maryland

Civil No. 71-853-K

Robert Francis, et al.

v.

Rita C. Davidson, et al.

Defendants.

The above-entitled case came on for hearing before The Honorable Harrison L. Winter, Associate Judge, U.S. Court of Appeals, Fourth Circuit, The Honorable Frank A. Kaufman, Associate Judge, U. S. District Court for the District of Maryland, and The Honorable Joseph H. Young, Associate Judge, U. S. District Court for the District of Maryland, at 2:40 o'clock p.m.

Appearances

For the Plaintiffs:

C. Christopher Brown and Curtis L. Decker. For the Defendants:

Joel J. Rabin and Judson P. Garrett, Jr.

(Judge Winter) Gentlemen, we think that we can arrive at a decision and state our reasons orally from the Bench this afternoon.

Judge Kaufman will speak for the Court.

(Judge Kaufman) Gentlemen, I think all the members of this Court want to compliment counsel in the case for the way in which the case was presented, and certainly compliment the State for all the efforts that have been

made to try to take care of the emergency situations which have arisen.

Originally, this Court was informed that counsel on both sides thought that the emergencies that cropped up could be taken care of as they came along. However, we have now been given information by plaintiffs, embodied in the material submitted by Mr. Brown in the motion for reconsideration which is before this Court today and in the several documents which he has filed within the last twenty-four to forty-eight hours.

Turning to the standards which are set forth in Long v. Robinson, 432 F.2d 977, particularly at page 979, that being a Fourth Circuit 1970 opinion written by Judge Winter, and another opinion, which Judge Winter also authored, West Virginia Highlands Conservancy v. Island Creek Coal Company, 441 F.2d 232, Fourth Circuit 1971, this Court has come to the conclusion that the motion of the plaintiffs for immediate injunctive relief should be granted insofar as the subclass composed of those who are unemployed because of discharge for misconduct is concerned.

Similarly, under those standards and for reasons which will be stated in a moment, the motion for injunctive relief will be granted with regard to the other subclass, namely, those out of work because of labor involvement.

However, with regard to that latter subclass, the injunctive relief which this Court grants today will be stayed pending appeal.

Insofar as the injunction concerning the subclass of those who are out of work, because of discharge for misconduct is concerned, there will be no stay. The Order of this Court granting the injunction will be effective immediately as of now.

Long v. Robinson sets forth four standards. As has been indicated during the colloquy between Judge Winter and one or more of counsel, those four standards do not each have to be met in order for injunctive relief to be granted and in order for any request for a stay to be denied.

Nevertheless, turning to each one of the standards and considering the problem before this Court in connection with the subclass which for short-cut purposes I will call the misconduct subclass, it would seem that each one of the Long v. Robinson standards is met in terms of the position advanced today by the plaintiffs.

First of all, in the opinion of this Court, this Court believes that the plaintiffs will likely prevail on the merits of the appeal.

Second, the facts which have been presented to us, incontrovertible facts, facts which the State commendably in no way disputes and which the State has helped bring before this Court in a most cooperative manner, established beyond doubt that irreparable harm will be suffered by at least three families if a stay of relief continues.

Insofar as the State is concerned and the possibility of substantial harm being incurred, we note the absence of any figures or data today other than rough estimates and general estimates.

However, the injunctive relief being granted today is without prejudice to the State to apply to this Court for the institution of a stay in connection with the injunctive relief which we make effective today with regard to the misconduct class if pending appeal new facts or new evidence come to the attention of the State which in the State's judgment require that an application be made for a stay of the injunctive relief which we are putting in force and effect today.

The fourth Long v. Robinson standard is the public interest, and it is hard for this Court to ascertain how the public interest will be served under these circumstances by allowing persons to be put in positions of extreme hardship, which the plaintiffs' evidence indicates they are currently being put, or at least three families are being put and there is reason to believe that other families are in a similar position.

With regard to the defendants' application for an immediate injunction covering the second subclass, the

subclass composed of those out of work because of labor involvement, this Court grants the injunction but will stay the effect of the injunction pending appeal.

That grant of the stay is without prejudice to plaintiffs' reapplying to this Court for a removal of that stay and for an immediate injunction covering that subclass, should new facts or new evidence come to the attention of the plaintiffs which cause the plaintiffs to believe that this Court should be asked to reconsider its stay of relief with regard to the labor involvement subclass.

Counsel are asked to confer and to prepare an order. If counsel can agree upon the words of the Order, they are asked only to present the Order. If not, plaintiffs' counsel are asked to present the Order, with comments by counsel for the defendants. That should be done as quickly as possible.

However, in the meantime, the injunctive relief granted today, subject to the provisions which I have orally stated in the last few moments, becomes effective immediately as of this moment.

(Judge Winter) Judge Young, do you have any comments or any additions you want to make?

(Judge Young) No.

(Judge Winter) I have none either, and I concur in Judge Kaufman's statement of the Court.

Now, you understand, gentlemen, that we consider the injunction in effect. As far as formalizing the injunction, we want you to try to agree on the language. If you cannot agree on the language, of course then we will hear you, at least informally, on your disagreements and enter an appropriate Order of our own.

I might add also that Judge Young will not be available for a period of some days after this afternoon. However, Judge Kaufman and I expect to be here continuously and we can sign the Order for the Court.

When you have an Order prepared, may I suggest that you submit it to Judge Kaufman as the managing Judge of the Court.

If there is nothing further, gentlemen, we will adjourn for the day.

Thank you very much.

(Thereupon, the hearing was concluded.)

ORDER
(Filed March 6, 1972)

In The United States District Court
For The District of Maryland

Civil No. 71-853-K

Robert Francis, et al.,
Plaintiffs,
v.
Rita C. Davidson, et al.,
Defendants.

Upon consideration of Plaintiffs' Motion To Reconsider Denial of Motion For Immediate and Final Injunctive Relief; Defendants' response thereto; the record, pleadings and affidavits in this matter; and the oral arguments of both parties thereon; and

In accordance with and for the reasons set forth in our findings and opinion announced in open Court on the 29th day of February, 1972, which reasons are incorporated herein by this reference thereto,

This Court finds that Plaintiffs are suffering and will suffer irreparable injury unless Defendants are permanently enjoined from denying public assistance under the program of Aid to Families With Dependent Children of Unemployed Fathers (AFDC-E) to persons who are

eligible for such assistance but for the fact that such persons are disqualified for Unemployment Insurance benefits as a result of misconduct in their previous employment or involvement in a labor dispute.

Whereupon, it is this 6th day of March, 1972, Ordered, Adjudged and Decreed:

1. That Plaintiffs' MOTION TO RECONSIDER etc., and PLAINTIFFS' MOTION FOR IMMEDIATE AND FINAL INJUNCTIVE RELIEF be and the same hereby are granted; and

2. That Defendants Rita C. Davidson and Irene Olson, their successors in office, agents, employees, and other persons in active concert or participation with them be and they hereby are PERMANENTLY ENJOINED AND RESTRAINED from refusing to grant public assistance under the AFDC-E program to persons otherwise eligible for such assistance but for the fact that such persons are disqualified for Unemployment Insurance benefits as a result of misconduct in their previous employment or involvement in a labor dispute; and

3. That, pending an appellate decision on the merits, the aforegoing injunction is hereby STAYED with respect to the sub-class of persons disqualified for Unemployment Insurance benefits due to involvement in a labor dispute; and

4. That the issuance of the aforesaid STAY is without prejudice to the right of the Plaintiffs to apply for reconsideration thereof in the light of new facts or evidence; and

5. That the denial of a STAY of the aforesaid injunction with respect to the sub-class of persons disqualified for Unemployment Insurance benefits by reason of misconduct is without prejudice to the right of the Defendants to apply for reconsideration thereof in the light of new facts or evidence; and

6. That costs be borne by the Defendants.

HARRISON L. WINTER,
United States Circuit Judge,
FRANK A. KAUFMAN,
United States District Judge.

MEMORANDUM FOR THE UNITED STATES
AS AMICUS CURIAE

In the Supreme Court of the United States

October Term, 1972

No. 71-1447
Rita C. Davidson, et al., Appellants
v.
Robert Francis, et al.

No. 71-1554
Chamber of Commerce of the United States,
Appellant,
v.
Robert Francis, et al.

On Appeals From
The United States District Court
For The District of Maryland

This memorandum is filed in response to the Court's invitation to the Solicitor General to file a memorandum expressing the view of the United States.

QUESTION PRESENTED

Whether Maryland Social Services Administration Rule 200.X.A.2, barring payment of certain welfare benefits both to individuals disqualified for unemployment insurance and to families of such individuals, is

valid under Department of Health, Education, and Welfare Regulation 223.100(a)(1).[1]

INTRODUCTION AND STATEMENT

This case involves the validity, under regulations promulgated by the Secretary of Health, Education, and Welfare, of certain provisions of Maryland's federally-assisted program of aid to families with dependent children of unemployed fathers ("AFDC-UF"). Federal payments on behalf of such State programs are authorized by Section 401 of the Social Security Act, 42 U.S.C. 601. Section 407(a) of that Act defines "dependent child" as including a "needy child * * * who has been deprived of parental support or care by reason of the unemployment (as determined in accordance with standards prescribed by the Secretary) of his father * * *," and Section 407(b) provides that in order to qualify for federal assistance, a State AFDC-UF program must provide payment of aid to any family with a dependent child when, with limitations not here relevant, "such child's father has not been employed (as determined in accordance with standards prescribed by the Secretary) for at least 30 days * * *."

Pursuant to the Secretary's authority to prescribe standards for the determination of the definition of "unemployment" to be used in State AFDC-UF programs, the following regulation, 45 C.F.R. 233.100(a)(1), was promulgated:

> If a State wishes to provide AFDC for children of unemployed fathers, the State plan must * * * [i]nclude a definition of an unemployed father
>
> (i) [w]hich shall include any father who is employed less than 30 hours a week[2] * * * and
>
> (ii) [w]hich may include any father who is employed less than 35 hours a week * * *.

---

[1] The Appeal in No. 71-1554 also challenges the district court's denial of the motion by the United States Chamber of Commerce to intervene. We express no opinion on that issue.

[2] After this action was instituted, the regulation was amended to read "* * * less than 100 hours per month * * *" 36 Fed. Reg. 13604 (July 22, 1971).

The purpose of the regulation was to establish a uniform hours-worked criterion for determining unemployment. Indeed, the wide variation in State hours-worked criteria was the main reason the Secretary was given authority in 1968 to prescribe federal standards under Section 407. See *Macias v. Finch,* 324 F. Supp. 1252, 1256-1257 (N.D. Cal.). The Secretary had not intended to do more than set a general hours-worked standard and had contemplated that the States would remain free to vary the coverage of their programs, on the basis of factors other than the number of hours worked, in accordance with their differing needs and policies. Thus it is the position of the Secretary that the standards prescribed by Regulation 233.100(a)(1) and by Section 407(b) do not constitute a complete and exclusive definition of "unemployment" or of "unemployed father."

Maryland Social Services Administration Rule 200.X.A.2 denies assistance under the Maryland AFDC-UF program when the father is disqualified for State unemployment insurance. Under Maryland law, strikers and persons discharged from employment due to "gross misconduct" are among those so disqualified. As a consequence, the Maryland program excludes from coverage some persons who work less than 30 hours a week and satisfy the other coverage requirements of Section 407(b). The Maryland program, however, does adopt the federal hours-worked criterion for the purpose of determining generally whether a person is unemployed. Therefore, the Secretary's approval of the Maryland AFDC-UF program was consistent with his interpretation of Regulation 233.100(a)(1).[3]

[3] Of course, approval of the Maryland program for purposes of federal assistance does not indicate that the Secretary deems the exclusion of families of men disqualified for unemployment insurance to be desirable. To the contrary, the Secretary has strongly recommended that State AFDC-UF programs should provide the maximum coverage permitted by the Social Security Act and the regulations thereunder. The Secretary has also concluded, however, that, within appropriate limits, this question of coverage is one best left to the States.

This action was instituted after appellees and their families were denied Maryland AFDC-UF assistance solely because they were disqualified for State unemployment insurance.[4] The complaint contended that Rule 200.X.A.2 was invalid under both the Equal Protection Clause of the Fourteenth Amendment and the Secretary's regulation; declaratory and injunctive relief was requested. A three-judge district court was convened pursuant to 28 U.S.C. 2281.[5] Applying *Dandridge v. Williams,* 397 U.S. 471, the court determined that the exclusionary classifications prescribed by Rule 200X.A.2 had a reasonable basis and accordingly held that the Rule does not violate appellees' rights to equal protection.[6]

In the exercise of its pendent jurisdiction, however, the court held that Rule 200X.A.2 was invalid under the Secretary's regulation. It reasoned that the language of the regulation could only be read as requiring participating States to include within the coverage of their AFDC-UF programs, without exception, the families of all fathers who worked less than 30 hours per week and satisfied the other requirements set forth in Section 407(b). The court determined that appellees were entitled to prospective relief only and enjoined appellants (in No. 71-1447) from refusing to grant assistance to persons eligible for assistance but for the fact that they are disqualified for unemployment insurance as a result of their misconduct in previous employment or their involvement in a labor strike.[7]

[4] Appellee Francis was disqualified because he was out of work due to a labor dispute; appellee Wright had been discharged from his previous employment for "gross misconduct."

[5] Appellants challenge the jurisdiction of the three-judge district court, contending that the constitutional claim was insubstantial. We express no opinion on that contention.

[6] We agree with the district court's decision on the constitutional issue and believe that it requires no further discussion in this memorandum.

[7] The injunction was stayed pending appeal with respect to persons disqualified for unemployment insurance by reason of involvement in a labor strike.

DISCUSSION

Long-standing principles of regulatory interpretation and administrative law require that deference be accorded to the Secretary's interpretation of his own regulations. *Udall v. Tallman*, 380 U.S. 1, 16-18. The decision below, however, illustrates that there is at least a legitimate basis for disagreeing with the current administrative interpretation of Regulation 233.100(a)(1). Therefore, in view of the conflicting constructions which have been placed on the regulation and the resulting potential for confusion in other States about its proper interpretation in these and other circumstances, the Secretary has determined to amend the regulation in a manner consistent with his original intent, in order to clarify its meaning. We are informed that under the proposed revision the regulation will expressly permit the States to vary, within limits, the coverage of their programs on the basis of factors other than the number of hours worked. This revision should remove any doubt concerning the validity of Maryland's Rule 200.X.A.2. Such a regulation is clearly within the authority granted by the basic statute. In these circumstances, this case does not warrant plenary review by this Court.

CONCLUSION

For the foregoing reasons, the judgment below should be summarily affirmed.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

August 1972.

Rita C. Davidson, Secretary, Maryland Department of Employment and Social Services, et al.,
Appellants,

v.

Robert Francis, etc., et al. No. 71-1447.

Appeal from the United States District Court for the District of Maryland.

Former decision, 408 U.S. 920, 92 S. Ct. 2495.

Facts and opinion, D.C., 340 F. Supp. 351.

Oct. 16, 1972. Motion of appellees for leave to proceed *in forma pauperis* granted. Judgment affirmed.

In the United States District Court
For the District of Maryland

December 10, 1973

C. Christopher Brown, Esq.
Mrs. Diana G. Motz
James P. Garland, Esq.
Rob Ross Hendrickson, Esq.
George Beall, Esq.

Dear Mrs. Motz and Gentlemen:

Re: Francis, et al. v. Davidson, et al.
Civil No. 71-853-K

Judges Winter and Young and I have conferred with regard to this case and have concluded that, for reasons set forth by this Court in its opinion filed January 28, 1972, and in the light of the amendments to the applicable federal regulations, set forth in 38 Fed. Reg. 18549, effective July 12, 1973, the motion of the defendants to dissolve the injunction previously granted by this Court should be granted. We are also of the opinion that the motion for intervention on behalf of the Chamber of Commerce of the United States should be granted. Accordingly, we request that counsel for the defendants and counsel for the proposed intervenor submit appropriate orders to this Court, with copies to counsel for plaintiffs, defendants, and the proposed intervenor, as well as to any other party which has enjoyed the status of amicus curiae in this case, on or before December 21, 1973.

Intervention at this time by the Chamber of Commerce will not cause any delay in the determination of the issues currently before this Court. That was not the situation when intervention was originally applied for.

At that time, intervention would almost certainly have caused substantial delay.

Very truly yours,

FRANK A. KAUFMAN.

cc: Honorable Harrison L. Winter
Honorable Joseph H. Young

MEMORANDUM AMICUS CURIAE OF THE DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE

In the United States District Court
For the District of Maryland

Civil No. 71-853-K

Robert Francis, et al.

v.

Rita C. Davidson, et al.

Introduction

This memorandum is submitted pursuant to the Court's request of January 8, 1974.

The Secretary of the United States Department of Health, Education, and Welfare (hereinafter "the Secretary") respectfully states that the defendants' Motion to Dissolve the Injunction Previously Issued,

filed on September 14, 1973, should be granted by this Court in that the Secretary's regulation promulgated at 38 Federal Register 18549 (July 12, 1973) was expressly promulgated in accordance with the suggestion of this Court in its prior opinion on this matter and that said regulation is consistent with the applicable provisions of the Social Security Act and within the Secretary's discretionary authority. Furthermore, the plaintiffs' Motion for Reconsideration is without merit and should in no way affect the dissolution of the Court's prior injunction.

This memorandum is directed solely to the issues arising under the Social Security Act and the implementing HEW regulations. The Secretary expresses no opinion as to whether the provision of AFDC-E to individuals participating in a labor dispute is contrary to federal labor laws and national labor policy.

Statement of the Case

On February 7, 1972, this Court held that Rule 200.X.A.2 of the Social Services Administration, Department of Employment and Social Services, of the State of Maryland, which denied assistance under the Maryland AFDC-E program when the father was found disqualified for state unemployment insurance, was violative of the Secretary of HEW's regulation promulgated at 45 C.F.R. 233.100(a)(1). Under the Maryland Rule, strikers and persons discharged from employment as a disciplinary measure or due to "gross misconduct" are among those so disqualified. Pursuant to that decision, on March 6, 1972, this Court enjoined the operation of the Maryland Rule, specifically enjoining the defendants from "refusing to grant public assistance under the AFDC-E program to persons otherwise eligible for such assistance but for the fact that such persons are disqualified for unemployment insurance benefits as a result of misconduct in their previous employment or involvement in a labor dispute." In its underlying opinion, this Court explained that the basis for its decision was a determination that the Maryland Rule "conflicts with the federal regulatory requirements" promulgated by the Department of HEW. See

Francis v. Davidson, 340 F. Supp. 351, 368 (D.C. Md., 1972).

In response to HEW's *amicus* memorandum filed in September, 1971, at the invitation of the Court, this Court stated that:

> "The said obligations of the State of Maryland hereunder with regard to the labor involvement issue will of course be different if, forthwith, after the filing of this opinion, the Secretary of HEW amends 45 C.F.R. § 233.100(a) in accordance with the discretionary authority conferred upon him by, and within the confines of, 42 U.S.C. § 607 as construed in this opinion." 340 F. Supp. at 368-9, footnote 29a.

Acting expressly on this suggestion, and in accordance with this Court's statutory construction that "Congress used words which did not mandatorily require each state to adopt the same meaning of the word 'employment' . . .," 340 F. Supp. at 367; the Secretary of HEW proposed (38 Federal Register 18549, July 12, 1973), a modification to his regulation authorizing states to adopt the Maryland policy at issue in this litigation. The introduction to the Secretary's proposed regulation expressly stated that it was being considered as a result of this Court's prior decision.

Therefore, the basis for this Court's previously issued injunction barring implementation of the Maryland Rule no longer exists and such injunction should be dissolved.

Applicable Law

42 U.S.C.A. § 607, as amended in 1968, provides as herein relevant:

§ 607. Dependent children of unemployed fathers; definition.

(a) The term "dependent child" shall notwithstanding section 606(a), include a needy child who meets the requirements of section 606(a)(2), who has been deprived of parental support or care by

reason of the unemployment (as determined in accordance with standards prescribed by the Secretary) of his father, and who is living with any of the relatives specified in section 606(a)(1) in a place of residence maintained by one or more of such relatives as his (or their) own home.

(b) The provisions of subsection (a) shall be applicable to a State if the State's plan approved under section 602—

(1) requires the payment of aid to families with dependent children with respect to a dependent child as defined in subsection (a) when—

(A) such child's father has not been employed (as determined in accordance with standards prescribed by the Secretary) for at least 30 days prior to the receipt of such aid,

. . .

The federal regulation, 45 C.F.R. 233.100(a), 34 Fed. Reg. 1146 (Jan. 24, 1969) which was found to be violated by Maryland Rule 200.X.A.2, provided in pertinent part that:

If a State wishes to provide AFDC for children of unemployed fathers, the State plan . . . must [with exceptions not here relevant]:

(1) include a definition of an unemployed father

(i) which shall include any father who is employed less than 30 hours a week, or less than three-fourths of the number of hours considered by the industry to be full time for the job, whichever is less, . . ."

That federal regulation, 45 C.F.R. 233.100(a), was amended, 38 Fed. Reg. 18549, effective July 12, 1973 to provide (new language underscored):

If a State wishes to provide AFDC for children of unemployed fathers, the State plan . . . must [with exceptions not here relevant]:

(1) include a definition of an employed father. . . . Such definition must include any father who:

(1) is employed less than 100 hours a month, or

(ii) exceeds that standard for a particular month, if his work in intermittent. . . . *except that, at, the option of the State such definition need not include a father whose unemployment results from participation in a labor dispute or who is unemployed by reason of conduct or circumstances which result or would result in disqualification for unemployment compensation under the State's unemployment compensation law.*

The Maryland Rule, formerly Social Services Administration Rule 200.X.A.2, which was enjoined as violative of the federal regulation provided as follows:

A grant may not be paid from GPA or AFDC-E:

. . .

2. To meet need due to being *disqualified for unemployment insurance.* (Emphasis supplied.)

Section 6 of Maryland's Unemployment Insurance Law, *Md. Anno. Code* Art. 95A provides in relevant part:

An individual shall be disqualified for benefits—

(b) *Gross misconduct.* — For any week in which his unemployment is due to his having been discharged for gross misconduct connected with his work. . . .

(c) *Discharge or suspension as a disciplinary measure.* — For the week in which he has been discharged, or suspended as a disciplinary measure, for conduct connected with his work. . . .

(e) *Stoppage of work because of labor disputes.* — For any week with which the Executive Director finds that his unemployment is due to a stoppage of work, other than a lockout, which exists because of a labor dispute. . . .

Argument

I. The Only Basis for the Injunction was the Finding that the Maryland Rule Violated 45 C.F.R. 233.100.

Plaintiffs' complaint alleged that Maryland Rule 200.X.A.2. was invalid under the Equal Protection and Due Process Clauses of the Constitution; Section 407 of the Social Security Act, 42 U.S.C.A. 607; and the Secretary's regulation, 45 C.F.R. 233.100. However, it is clear that the only ground on which the Court based its injunction was the conflict that the Court found between the Maryland Rule and the HEW regulation. As the Court stated:

> "It follows from our conclusion that Maryland's program, insofar as Maryland fails to afford AFDC-E relief where fathers are out of work because of gross misconduct or because of involvement in labor disputes, is incompatible with federal regulatory requirements . . ." 340 F. Supp. at 368.

Applying *Dandridge v. Williams*, 397 U.S. 471, this Court determined that there is a rational basis for the state's decision to deny public assistance to those ineligible for unemployment insurance, and that, therefore, Maryland's Rule is constitutional.

This Court also overruled plaintiffs' statutory claim, specifically with regard to the labor dispute disqualification and by necessary implication with regard to the gross misconduct and discharge as a disciplinary measure disqualification.

As to the labor dispute disqualification, this Court specifically found that the statute, 42 U.S.C.A. 607, permitted the Secretary to authorize a labor dispute disqualification option, but that the federal regulation then in effect expressly prohibited such an option. 340 F. Supp. at 367-368.

Absent the same prohibitory regulation, the Court also implied that the federal statute is broad enough to permit the Secretary to authorize a gross misconduct and discharge as a disciplinary measure disqualification option. The Court stated,

> "It is true that such approval [HEW approval of Maryland's Rule] is entitled to considerable weight by this Court, particularly when Congress has delegated policy-making to the agency."

340 F. Supp. at 365. Thus, with regard to the part of the Maryland Rule involving fathers who were discharged because of gross misconduct or as a disciplinary measure, the Court concluded it was only the "unambiguous and mandatory language" of the then existing federal *regulation* which conflicted with the Maryland Rule.

II. Due to the Amendment of the Federal Regulation, 45 C.F.R. 233.100, the Injunction of the Maryland Rule Should Be Dissolved Pursuant to F.R.C.P. 60 b (5).

As we have stated, pursuant to 38 Federal Register 18549 (July 12, 1973), 45 C.F.R. 233.100(a) has been amended so that the states' definition as to unemployed fathers:

> "need not include a father whose employment results from participation in a labor dispute or who is unemployed by reason of conduct or circumstances which result or would result in disqualification for unemployment compensation under the State unemployment insurance law."

This change in the Secretary's regulation specifically authorizes states to implement the enjoined Maryland Rule and, as a matter of fact, was amended as a result of this Court's prior decision after careful consideration of this Court's suggestion that such action be taken. 340 F. Supp. at 368, footnote 29a.

Due to this action by the Secretary, the existing injunction of the Maryland Rule should be dissolved pursuant to the provisions of Rule 60b(5) of the Federal Rules of Civil Procedure, as defendants' have so moved. Rule 60b(5) allows relief from a judgment where "it is no longer equitable that the judgment should have prospective application." As found by the United States

Supreme Court in a case involving the amendment of the Railway Labor Act:

> "There is . . . no dispute but that a sound judicial discretion may call for the modification of the terms of an injunctive decree if the circumstances, whether of law or fact, obtaining at the time of its issuance have changed, or new ones have arisen." *System Federation No. 91, Railway Employees v. Wright,* 364 U.S. 642, 644-645 (1961).

The Secretary submits that his recent amendment to 45 C.F.R. 233.100(a) which specifically authorizes the enjoined Maryland Rule, has removed the basis for this Court's injunction and therefore the continuation of said injunction of the Maryland Rule is no longer equitable. *Tobin v. Alma Mills,* 172 F.2d 133, 136 (4 Cir. 1951) *cert. denied,* 343 U.S. 933 (1952); *Pennsylvania v. Wheeling & Belmont Bridge Company,* 59 U.S. 421 (1856).

III. Plaintiffs' Contentions, Previously Rejected by the Court, Continue to Lack Merit.

As we have previously stated, this Court has already rejected plaintiffs' constitutional and statutory claims. As there has been no factual or legal change therein, this Court's prior determination is binding on the plaintiffs and may not now be relitigated.

Furthermore, plaintiffs' continuing attack on the amended HEW regulation ignores the fact that virtually all of plaintiffs' arguments were previously made to this Court and have been expressly or impliedly rejected by this Court in its prior opinion at 340 F. Supp. 351, affirmed 409 U.S. 904. In fact, the said decision specifically indicated that a regulation such as the amended HEW regulation would be appropriate and would validate the Maryland Rule. 340 F. Supp. at 368, footnote 29a.

The Supreme Court has stated, "the rule of the law of the case is a rule of practice, based upon the sound policy that when an issue is once litigated and decided, that should be the end of the matter." *USA and I.C.C. v. Smelting, Refining and Mining Co.,* 339 U.S. 186. As

such is the case here, this Court's previously issued injunction should be dissolved on the above stated grounds.

IV. The Secretary's Regulation is Consistent with Section 407 of the Social Security Act and This Court's Prior Determination on This Matter.

Assuming, *arguendo,* that this Court determines that its prior decision and the subsequent amendment of the HEW regulation are not in and of themselves a sufficient basis on which to dissolve the injunction previously granted, but that further consideration is necessary, the Secretary asserts that the amended regulation is consistent with both Section 407 of the Social Security Act and this Court's prior determination of this matter.

A. The Extent of the Federal Definition of Unemployment.

As the Secretary stated in his prior *amicus* brief, when Congress first enacted an unemployment segment to the AFDC program, section 407 of the Social Security Act expressly referred to "unemployment (as defined by the *State*)." [Emphasis supplied]. P.L. 87-31, sec. 1. However, this section 407 was amended by P.L. 90-248, section 203(a), effective January 1, 1968 and still in effect, and now refers to "unemployment (as determined in accordance with standards prescribed by the Secretary.)" The report of the House Ways and Means Committee gave the following explanation:

> A major characteristic of the law is the authority left to the States to define "unemployment." Your committee believes that this has worked to the detriment of the program because of the wide variation in the definitions used by the States. In some instances, the definitions have been very narrow so that only a few people have been helped. In other States, the definitions have gone beyond anything that the Congress originally envisioned. Your committee's bill is designed to correct this situation and to make other improvements in the

> program. The overall objective of the amendments proposed by the Committee is to authorize a federal definition of unemployment by the Secretary (but within certain limits set forth in the legislation), to tie the program more closely to the work and training program authorized by the bill, and to protect only the children of unemployed fathers who have had a recent attachment to the work force. With these changes, the committee recommends that the program become a permanent part of the Social Security Act, still on an optional basis with the States. H.R. Rep. No. 544. 90th Cong., 1st Sess. 160 (1967).

Thus, there was clearly to be a greater degree of federal direction with regard to the definition of unemployment, with consequently greater uniformity among the states. Nevertheless, the language both of the Act and the committee reports falls short of mandating a single, exclusive federal definition.

This view was specifically recognized by this Court in its previous decision on this matter, 340 F. Supp. at 367, wherein the Court held:

> . . . [I]t is to be noted that when Congress removed the parenthetical words "as determined by the State," and substituted the words "as determined in accordance with standards prescribed by the Secretary." Congress did not simply substitute the words "as determined by the Secretary."

Thus, Congress clearly chose words which did not direct the Secretary to require each state to adopt the same meaning of the word "unemployment" but instead merely authorized the Secretary to prescribe standards circumscribing the states' determinations of the definition of "unemployment."

Furthermore, in their opposition to defendants' motion to dissolve the injunction, plaintiffs reliance on the legislative history to support their position that 42 U.S.C.A. §607 requires a single, exclusive federal definition of "unemployment" is misplaced. First, in doing this, plaintiffs attempt to equate the amended language of the statute with the former use of the word

"defined." But such a construction of the statute would render the additional and expanded change in wording superfluous, and it is an honored principle of statutory construction that statutes are to be given "such effect that no clause, sentence or word is rendered superfluous, void, contradictory or insignificant." *Rockbridge v. Lincoln,* 449 F.2d 567, 571 (9th Cir. 1971); *Richards v. United States,* 369 U.S. I, II, (1962).

Moreover, plaintiffs are straining to support their position through legislative history which this Court indicated in its prior opinion on several occasions (340 F. Supp. at 365, footnote 25, 366, 367) is essentially inconclusive. The wording of the statute itself is contrary to their position. As stated by the Supreme Court in *Gemsco v. Walling,* 324 U.S. 244, 260 (1945):

> "The plain words and meaning of a statute cannot be overcome by legislative history which, through strained processes of deduction from events of wholly ambiguous significance, may furnish dubious bases for inference in every direction." Accord: *Ex Parte Collett,* 337 U.S. 55, 61 (1949).

B. The Relationship of the Secretary's Regulation, and therefore the Maryland Rule, to the Purposes and Provisions of section 407 of the Social Security Act.

In reaching this point, the next issue to be determined is whether the Secretary's new regulation, setting forth the standards by which AFDC-E applicants are to be determined as "unemployed," is consistent with the provisions of the statute at 42 U.S.C.A. §607.

The federal regulation provides two options for the states within the standards prescribed by the Secretary for determining the "unemployment" of an otherwise eligible applicant for AFDC-E. As the regulation states, "at the option of the State, such definition need not include a father whose unemployment results from participation in a labor dispute or who is unemployed by reason of conduct or circumstances which result or would result in disqualification for unemployment compensation under a State's unemployment compensation law."

It seems apparent from this Court's previously quoted footnote 29 of its original decision and the Court's own construction of 42 U.S.C. 607, that this Court believes that with regard to the labor dispute issue a regulation such as that promulgated by the Secretary on July 12, 1973, is "in accordance with the discretionary authority conferred upon him (the Secretary) by, and within the confines of, 42 U.S.C. §607, as construed" by this Court. In its prior decision, this Court specifically stated that, "The Secretary could have authorized Maryland to exclude from AFDC-E benefits those out of work because of labor disputes." 340 F. Supp. at 638. The Court further stated that "in so doing this Court agrees that the Congress empowered the Secretary, by regulations, to require each participating state (1) to include or (2) to exclude from its respective AFDC-E program those out of work because of involvement in labor disputes, or (3) to leave that decision to each State." Id. at 367. Thus, the Secretary has now provided the option suggested by the Court by amending his regulation to permit states to choose whether they want to include or exclude from AFDC-E those needy dependent children whose fathers are, in fact, unemployed because of participation in a labor dispute, an option clearly, in the view of this Court, authorized by the statute.

Based on this very same reasoning, it is clear that HEW also has the authority to prescribe standards in determining "unemployment" so as to permit states the option of including needy dependent children or excluding them from AFDC-E if their fathers are, more generally, disqualified from unemployment insurance. This the Secretary has also done in the new regulation.

Underlying the Court's conclusion is its recognition that HEW has wide latitude in prescribing standards for the definition of "unemployment" provided the standards are reasonable in light of the provisions and purposes of the Social Security Act. For, as this Court has recognized at 340 F. Supp. at 365, Congress has delegated broad rule-making powers to HEW in connection with administering the program. Likewise, this Court has recognized HEW's authority under the statute to grant discretion to the states. Id. at 365.

These principles were recently reaffirmed by the Supreme Court in the case of *New York State Department of Social Services v. Dublino*, ___ U.S. ___, 41 USLW 5047, 5052 (June 19, 1973), wherein that Court stated:

> "In interpreting this statute, [the Social Security Act] we must be mindful that 'the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong. . . .' Red Lion Broadcasting Co. v. FCC, 355 U.S. 367, 381 (1969); Dandridge v. Williams, *supra*, at 481-482."

In this case, such indications are wholly absent.

Giving states the option to impose such a restriction is truly compatible with the provisions of the Social Security Act relating to AFDC-E. Under section 407(b)(1)(B) of the Act, 42 U.S.C.A. 607(b)(1)(B), and 45 CFR 233.100(a)(3)(ii), the state plan must provide as an eligibility condition that the father has not without good cause, within 30 days prior to receipt of aid, refused a bona fide offer of employment or training for employment. The determination of what constitutes "good cause" and what constitutes a refusal of a bona fide offer of employment is largely left to the state, which, on the one hand, might reasonably determine that an individual disqualified for unemployment insurance because he is a striker is refusing his prior employment on a continuing basis without good cause, within the meaning of the statute. Similar reasoning would support exclusion from AFDC-F on the basis of other grounds of disqualification for unemployment insurance, depending on the specific basis for the disqualification and the timing in relation to the receipt of AFDC-E.

On the other hand, a state may elect to include such families where neither earnings nor unemployment benefits are available to meet the family's basic needs, without regard to the cause of disbarment from unemployment insurance benefits. Both schools of thought have their advocates and both are reasonable. Thus, leaving the choice to the states is a proper

exercise of the Secretary's discretion and clearly not susceptible of being characterized as wrong.

Moreover, there is another reason for providing this option. The Act also provides an absolute bar to AFDC-E benefits where the father qualifies for unemployment insurance, evidencing the congressional concern that public assistance not impair the integrity of the unemployment insurance program. Thus, section 407(b)(2)(C) of the Social Security Act, 42 U.S.C.A. 607(b)(2)(C), requires that a state plan preclude payment of AFDC-E with respect to any week for which the father receives state or federal unemployment insurance, even if the insurance benefits are inadequate to meet the family's need. This is the only circumstance specified in the public assistance titles of the Social Security Act in which receipt of benefits under a public benefits program results in complete ineligibility for public assistance, further emphasizing the congressional interest in the proper relationship between AFDC-E and unemployment insuramce. See *Burr v. Smith*, 322 F. Supp. 980 (W.D. Wash. 1971). Although the statute does not similarly require an absolute exclusion from AFDC-E because the father has been determined to be disqualified for unemployment compensation, a state may, when given such an option by the Secretary, reasonably conclude that payment of public assistance to a father who does not qualify for employment related income protection will undermine the purposes of the unemployment insurance law. In fact, this consideration appears to be the basis for Maryland's Rule 200.X.A.2, which attempts to avoid the anomaly of denying AFDC-E to those who receive unemployment insurance benefits while providing it to those who are disqualified for unemployment insurance because of their own acts. This Court has expressed some skepticism as to this so-called "anomaly," 340 F. Supp. at 365, footnote 24. However, based on the Court's recognition of the Secretary's authority to provide the states with options as to the definition of "unemployment," as well as the Secretary's broad rule-making authority, we believe that the fact that this exclusion is now specifically authorized by the Secretary's regulation should alleviate this Court's concern. The test is not whether this Court agrees with the state's choice, but whether the option granted by the Secretary's regulation is consistent with the statutory scheme and falls within the Secretary's authority. We believe that it is.

C. The Relationship of AFDC-E to Unemployment Compensation under the Statute.

Plaintiffs contend that, even if HEW has some authority to grant discretion to the states in defining the statutory word "unemployment," the Secretary is precluded by the statute from granting discretion in the area of the "relationship of AFDC-E to unemployment insurance" due to the fact that section 407(b) sets out the exclusive Congressional scheme as to this relationship. However, as this Court has already ruled that the statute does permit HEW to grant discretion to the states, this argument would have merit only if the statutory language or the legislative history clearly indicated that there is an exception to this general delegation of authority for this particular relationship. In other words, the statute itself or the legislative history must clearly show that Congress intended to, in the plaintiffs' words, "preempt" the field. Plaintiffs have not demonstrated such an exception.

On the contrary, the Maryland Rule, as now authorized by the Secretary, is consistent with the pattern established by the Congress under section 407 for the definition of "unemployment" and it is also consistent with other provisions of section 407, particularly the requirement for denial of AFDC-E to individuals receiving unemployment compensation benefits.

D. The Secretary's Failure to Define "Unemployment."

Plaintiffs argue that due to the fact that the HEW regulation fails to define "unemployment" according to the American College Dictionary, the Secretary's regulation "must be declared null and void and without legal effect." Yet, as we have already demonstrated, and as this Court has recognized, the statutory

language which we are discussing here established the AFDC-E program as a program which provides benefits to needy children whose father are unemployed as determined in accordance with standards prescribed by the Secretary. Thus, the statute itself clearly authorizes HEW to prescribe only the standards for the states in choosing a definition of unemployment and not necessarily to mandate any definition of unemployment itself. This Court recognized the weakness of this argument of the plaintiffs at 340 F. Supp. 366, footnote 28, wherein it stated:

> "Nor does the usage of the word 'employed' or similar words in other contexts compel any one meaning of the word 'unemployment' as used in 42 USC 607 or the word 'employed' as used in 45 CFR §233.100(a).

V. The *Townsend v. Swank* Line of Cases is Distinguishable from the Present Controversy.

In three major cases, the Supreme Court has ruled that states cannot exclude from public assistance coverage any person who has met the basic federal definition of eligibility for AFDC. See *Townsend v. Swank*, 404 U.S. 282 (1971); *Carleson v. Remillard*, 406 U.S. 598 (1972) and *King v. Smith*, 32 U.S. 309 (1968).

Plaintiffs rely heavily on these cases in their argument, yet all of these cases are clearly distinguishable from the present controversy. The Court's decision in each of those cases was founded upon the inconsistency of state eligibility requirements with federal ones specified in the Social Security Act. However, in the present case, the determination of "unemployment" status is clearly to be left to the states by the very terms of the statute determined in accordance with standards prescribed by the Secretary. In other words, the Act specifically contemplates state determinations of the definition of "unemployment" and such a determination, if in accord with federal standards, is not a collateral condition imposed by the state. Thus, the cases on collateral conditions of eligibility are not applicable here; the present suit deals not with

collateral factors, but with the qualifying definition itself. The question is not whether a family which is eligible under the express provisions of the Social Security Act may be disqualified because of an additional state-imposed condition; it is whether the statutorily imposed and state-implemented condition of unemployment is met.

Plaintiffs' improper reliance on the *Townsend v. Swank* line of cases has resulted in plaintiffs' use of the wrong test for determining the validity of the new HEW regulation. In those cases, the focus was on determining the validity of state eligibility conditions, and the Court held that that determination required specific "congressional authorization for the exclusion clearly evidenced from the Social Security Act or its legislative history." *King v. Smith*, 392 U.S., at 333, footnote 34. Here, however, we are dealing with the validity of the federal standard, and the test is whether that standard, as established by the Secretary's regulations, is consistent with the Social Security Act.

Finally, we would mention that, in any case, the Supreme Court has recently modified its rulings in the *Townsend* line of cases by its decision in *New York State Board of Social Services v. Dublino, supra.* As the Court stated therein with regard to the State of New York's so-called Work Rules, which required cooperation by employable individuals to continue to receive assistance:

> ". . . the Act allows for complementary state work incentive programs and procedures incident thereto — even if they became conditions for continued assistance. Such programs and procedures are not necessarily invalid, any more than other supplementary regulations promulgated within the legitimate sphere of state administration. See *Wyman v. James*, 400 U.S. 309 (1971); *Snell v. Wyman*, 281 F. Supp. 853, aff'd, 393 U.S. 323 (1969). See also *Dandridge v. Williams, supra; Jefferson Jefferson v. Hackney, supra.*"

Conclusion

For the foregoing reasons, the Secretary believes that the injunction against the Maryland Rule 200.X.A.2 should be dissolved.

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Memorandum Amicus Curiae of the Department of Health, Education, and Welfare were mailed postage prepaid to C. Christopher Brown, Esq., Legal Aid Bureau, Inc., 341 N. Calvert St., Baltimore, Md. 21202; Joel J. Rabin, Esq. and Diana G. Motz, Esq., Assistant Attorney's General, 1100 N. Eutaw St., Baltimore, Md. 21201; Lawrence M. Cohen, Esq., 111 W. Washington St., Chicago, Illinois 60602; and Rob Ross Hendrickson, Esq., Suite 900, 301 North Charles Street, Baltimore, Md. 21201; attorneys for defendants and other persons who have appeared herein, this 19 day of February, 1974.

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In the United States District Court
For The District of Maryland

Civil No. 71-853-K.
June 25, 1974

Robert Francis, etc., et al.

v.

Rita C. Davidson, Secretary, Department of Employment and Social Services, et al.,

The Chamber of Commerce of the United States, Intervenor,

Department of Health, Education & Welfare, Amicus Curiae.

Action for injunctive relief against enforcement of state regulations in regard to AFDC benefits. The state moved to dissolve the injunction. A three-judge District Court, Frank A. Kaufman, J., held that Maryland AFDC-E regulation excluding from benefits children of fathers unemployed because of labor disputes was invalid.

Motion to dissolve injunction denied.

FRANK A. KAUFMAN, District Judge.

After this Court's first opinion in this case[1] was summarily affirmed by the Supreme Court of the United States,[2] the Secretary of the Department of Health, Education and Welfare (HEW) promulgated, effective July 12, 1973, an amendment to 45 C.F.R. § 223.100(a). Prior to that amendment, that regulation provided in part:

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[1] 340 F. Supp. 351 (D. Md. 1972).

[2] 409 U.S. 904, 93 S. Ct. 223, 34 L. Ed. 2d 168 (1972).

If a State wishes to provide AFDC for children of unemployed fathers, the State plan * * * must [with exceptions not here relevant] * * *:

(1) Include a definition of an unemployed father

(i) Which shall include any father who is employed less than 30 hours a week, or less than three fourths of the number of hours considered by the industry to be full time for the job, whichever is less, and

(ii) Which may include any father who is employed less than 35 hours a week, or less than the number of hours considered by the industry to be full time for the job, whichever is less.

After the July 12, 1973 amendment, subsections (i) and (ii) of 45 C.F.R. § 23.100(a)(1) were amended to read as follows:

(i) Is employed less than 100 hours a month; or

(ii) Exceeds that standard for a particular month, if his work is intermittent and the excess is of the temporary nature as evidenced by the fact that he was under the 100-hour standard for the prior 2 months and is expected to be under the standard during the next month;

except that, at the option of the State, such definition need not include a father whose unemployment results from participation in a labor dispute or who is unemployed by reason of conduct or circumstances which result or would result in disqualification for unemployment compensation under the State's unemployment compensation law.[3]

[3] Before adopting that amendment HEW published on January 3, 1973 the following notice in 38 Fed. Reg. 49:

Social and Rehabilitation Service

[45 CFR Part 233]

COVERAGE AND CONDITIONS OF ELIGIBILITY IN FINANCIAL ASSISTANCE PROGRAMS

Dependent Children of Unemployed Fathers

Notice is hereby given that the regulation set forth in tentative, alternative form below is proposed by the Administrator, Social and Rehabilitation Service, with the approval

Thereafter, the State of Maryland, citing the July 12, 1973 change in the federal regulation, moved to dissolve the injunction this Court issued in accordance with its

of the Secretary of Health, Education, and Welfare. Both alternatives would amend § 233.100(a) (1), which provides a Federal definition of unemployed father under the AFDC program in terms of hours of work.

In applying the existing regulation, the Department policy has been to permit a State, at its option, to use a definition of unemployed father which imposes additional conditions relating to the reason for the unemployment, e.g., the State definition might exclude a father whose unemployment, results from participation in a labor dispute or who is unemployed by reason of conduct or circumstances which result or would result in disqualification for unemployment compensation under the State's unemployment compensation law. In Davidson v. Francis, the U.S. Supreme Court on October 16, summarily affirmed the judgment of the district court which held, in effect, that while the Secretary has broad authority to define an unemployed father for purposes of section 407 of the Social Security Act, the existing Federal regulation provides only an hours-of-work test, and thus prohibits a State from excluding fathers who meet this test but are disqualified for unemployment compensation.

Accordingly, the proposed alternative A below would amend the regulation to make the prior Department policy explicit, by stating the options which are permitted to the States in defining an unemployed father. Alternative B, on the other hand, would amend the regulation to make clear that the hours-of-work test is intended as the exclusive definition of unemployed father, so that States may not have definitions which impose added conditions. This would be a change in Department policy, but would be consistent with the way that the existing regulation has been interpreted by the courts.

Davidson v. Francis attracted broad interest from States, assistance recipients, and industry and labor groups. The regulations are proposed in alternative form to give all those who are interested full information as to the various courses of action which are being considered.

* * * * * *

ALTERNATIVE A

[Alternative A was adopted word-for-word on July 12, 1973 and is set forth *supra* in the body of this opinion.]

earlier opinion.[4] Plaintiffs noted their opposition to the State's motion. Subsequently, this Court granted the motion of the United States Chamber of Commerce to intervene,[5] requested and received the written views of the Secretary of HEW pursuant to Rosado v. Wyman, 397 U.S. 397, 406-407, 90 S. Ct. 1207, 25 L. Ed. 2d 442 (1970), received briefs, and heard oral argument from the parties and the intervenor.[6]

ALTERNATIVE B

Section 233.100(a) (1) of Chapter II of Title 45 of the Code of Federal Regulations is revised to read as follows:

§ 233.100 Dependent children of unemployed fathers.

(a) *Requirements for State plans.* * * *

(1) Include a definition of an unemployed father which shall apply only to families determined to be needy in accordance with the provisions in § 233.20 and shall include any father who:

(i) Is employed less than 100 hours a month, or

(ii) Exceeds that standard for a particular month, if his work is intermittent and the excess is of a temporary nature as evidenced by the fact that he was under the 100-hours standard for the 2 prior months and is expected to be under the standard during the next month.

This shall be the exclusive definition of an unemployed father.

* * * * * *

[FR Doc. 73-33 Filed 1-2-73; 8:45 am]

[4] In its January 28, 1972 opinion, this Court concluded (340 F. Supp. *supra* at 371) that injunctive relief was not required. Subsequently, at the request of the parties, in order to avoid ambiguity as to the status of this Court's holding and the appropriate appellate channel to be utilized in appealing therefrom, this Court granted injunctive relief on March 16, 1972.

[5] The intervenor urged the same result as did the State with regard to those out of work because of a labor dispute and took no position with regard to those out of work because of discharge for cause.

[6] While no constitutional question was raised by the State's motion to dissolve, this three-judge court determined not to dissolve itself and return the case to a single district judge, for the same reasons as are set forth in 340 F. Supp. *supra* at 364 n. 23.

Discharge for Cause

In its prior opinion[7] this Court held invalid Maryland's Rule 200.X.A.(2) which renders ineligible for AFDC-E aid children of "fathers who were discharged for gross misconduct or as a disciplinary measure", because that rule was in conflict with 45 C.F.R. § 233.100(a) as then written. In so doing this Court wrote:

> * * * A man out of work because he was discharged for cause by his employer *is unemployed.* There can be no two ways about that conclusion. * * * [Emphasis in original.]

[1, 2] The conflict between the federal and the Maryland regulation ended after the former was amended in July 1973 to permit each State to render ineligible for AFDC-E aid children whose fathers were unemployed by reason of their conduct. The federal regulation, as so amended, conflicts however with the provision for aid in 42 U.S.C. § 607(a) for "a needy child * * * who has been deprived of parental support or care by reason of the *unemployment* (as determined in accordance with standards prescribed by the Secretary) of his father * * *."[8] The statute relates to the unemployment of a father — and a father who is discharged for cause by his employer *is* unemployed. Because the federal regulation is incompatible with the federal statute, it follows that the Maryland regulation as of this date is based upon a provision authorized by an invalid federal regulation, and is thus itself invalid. Until the Congress amends the statute, no combination of federal and state regulations may provide that a father who is unemployed is not unemployed.

Labor Dispute

By way of contrast a person out of work because of a labor dispute does not necessarily fall within the definition of "unemployed". In 1968, the Congress

[7] 340 F. Supp. *supra* at 366.

[8] (Emphasis supplied.) The statute is set forth in full at 340 F. Supp. *supra* at 371-373, Appendix A, and has not since been amended by the Congress.

enacted an amendment to 42 U.S.C. § 607(b) providing for the Secretary rather than the State to define unemployment. Commenting upon that amendment in its prior opinion, this Court wrote that "* * * the Congress empowered the Secretary, by regulation, to require each participating state (1) to include or (2) to exclude from its respective AFDC-E program those out of work because of involvement in labor disputes, or (3) to leave that decision to each state. * * * " *Id.* at 367. Further, in that earlier opinion[9] this Court concluded that the Secretary by regulation at that time required participating States to classify those out of work because of labor disputes as "unemployed" and held Maryland's contrary regulation invalid. As related *supra*, the Secretary subsequently amended the federal regulation. That amendment established no standards for the States to follow and simply permitted each State to do as it chose. Thus, the Secretary interpreted this Court's opinion as nullifying the 1968 amendment.

Candor requires this Court to state that the language used by this Court in its earlier opinion in describing the three alternatives available to the Secretary does — literally read — permit the amendment promulgated by the Secretary on July 12, 1973. That language could have, and from hindsight should have, included as part of alternative (3) and after the words "to leave that decision to each state" the additional words "in accordance with appropriate standards established by the Secretary". The need for the inclusion of those words is strongly supported by the legislative history of the 1968 statutory amendment which makes it clear that the Congress, in 1968, no longer was willing to allow each state to define the word "unemployment" for itself, but rather desired that national standards be established by the Secretary. "Section 607 was amended in 1968 to remove from the states the authority to define unemployment * * *." Macias v. Finch, 324 F. Supp. 1252, 1256 (N.D. Cal.), aff'd, 400 U.S. 913, 91 S. Ct. 180, 27 L. Ed. 2d 153 (1970). For example, the Under Secretary of HEW in 1967, Wilbur Cohen, stated to the Senate Finance Committee:

[9] 340 F. Supp. *supra* at 367-370.

> Today, 22 states have programs to assist such children. But the differences between State programs are great. States may define unemployment as narrowly or broadly as they wish, requiring substantial previous work experience or no work experience.
>
> * * * * * *
>
> * * * [F]or the first time the House Bill would set a Federal definition of unemployment. We are in complete agreement that there should be a Federal definition of unemployment.[10]

And the House Report,[11] with regard to the bill which embodied that amending language, explained:

> * * * Under present [1961] law, the States can establish programs for families with dependent children based on the unemployment of a parent and receive Federal matching. The definition of unemployment is left up to the individual States. Under the bill, Federal matching would be available only for the children of unemployed fathers and the definition of unemployment would be made by the Federal Government.

The Secretary, instead of being required to promulgate a national definition, was required by the 1972 amendment only to establish national standards within which the regulations of each of the states were to be channelized and confined. The July 12, 1973 federal regulation contains no standards whatsoever. Accordingly, that federal regulation does not carry out the intent of the 1968 amendment and is thus invalid. Accordingly also, the Maryland AFDC-E regulation excluding those unemployed because of labor disputes remains invalid.

It follows that the State's motion to dissolve this Court's outstanding injunction in this case must be, and it hereby is, denied.

[10] Parts of statement before the Senate Finance Committee on August 22, 1967, p. 268.

[11] H.R. Rep. No. 544, 90th Cong., 1st Sess. 17 (1967).

In The United States District Court
For the District of Maryland

Civil No. 73-874-H
Nov. 27, 1974

Barry Bethea, Individually and on behalf of his minor child, Barry Bethea, Jr., Plaintiffs,

v.

David T. Mason, Secretary, Maryland Department of Employment and Social Services, Defendant.

ALEXANDER HARVEY, II, District Judge:

In Francis v. Davidson, 340 F. Supp. 351 (D. Md.), aff'd 409 U.S. 904, 93 S. Ct. 223, 34 L. Ed. 2d 168 (1972) (hereinafter *Francis I*), a three-judge court in this District considered constitutional and other issues relating to the administration of the AFDC-E program by the State of Maryland.[1] The plaintiffs in *Francis I* were fathers who had been discharged from employment for misconduct or who had become unemployed because of a labor dispute. They there brought a class action seeking declaratory and injunctive relief and damages, alleging that benefits under the AFDC-E program had been denied to their children by the Maryland Department of Employment and Social

[1] AFDC-E is the commonly-used label for a program established by Congress in 1961 pursuant to Section 407 of the Social Security Act, 42 U.S.C. § 607, providing aid for the children of fathers who are unemployed. The program, which depends upon a combination of both federal and state funds, is administered by the various participating states pursuant to regulations of the Department of Health, Education and Welfare. The history of the AFDC-E program is discussed more fully in *Francis I, supra,* at 354, n. 1.

Services under its Rule 200.X.A.(2)[2] They alleged that the Rule violated (1) the Equal Protection Clause of the Fourteenth Amendment and (2) 42 U.S.C. § 607 and regulations of the Department of Health, Education and Welfare (hereinafter HEW).

In *Francis I,* Judge Kaufman, writing for a unanimous three-judge panel, found first that the Court had jurisdiction under 28 U.S.C. § 1343(3) because the equal protection claim asserted by the plaintiffs was not frivolous.[3] However, applying the test laid down in Dandridge v. Williams, 397 U.S. 471, 90 S. Ct. 1153, 25 L. Ed. 2d 491 (1970), the Court considered the plaintiffs' equal protection contentions on their merits and rejected them. Next, the Court concluded that although it had rejected the constitutional claim, it should "continue to assert its jurisdiction and proceed to resolve the issues herein involving federal statutes and federal regulations." 340 F. Supp. at 360. Finally, ruling on the pendent statutory claim, the Court in *Francis I* held that the State of Maryland could not under Rule 200.X.A.(2) deny AFDC-E benefits to children of fathers who were unemployed because they had been discharged for misconduct or because they had been involved in a labor dispute. The Court found that the

[2] Rule 200.X.A.(2) denies AFDC-E benefits to children of fathers who are "disqualified for unemployment insurance." The Rule provides, in part, as follows: "A grant may not be paid from GPA or AFDC-E: * * * (2) To meet need due to being disqualified for unemployment insurance." Maryland's Unemployment Insurance Law provides that an individual does not qualify for unemployment insurance benefits if he is discharged for "gross misconduct" or if it is determined that "his unemployment is due to a stoppage of work, other than a lockout, which exists because of a labor dispute * * *." Annotated Code of Maryland, Art. 95A, §§ 6(b) and 6(e) (1969 Repl. Vol.).

[3] The Court found it unnecessary to determine whether jurisdiction also existed under 28 U.S.C. § 1343(4) or § 1337. 340 F. Supp. at 360, n. 20.

Rule was in conflict with HEW regulations establishing mandatory standards of eligibility for benefits.[4]

After the Supreme Court summarily affirmed the *Francis I* opinion, the Secretary of HEW promulgated an amendment to the HEW regulations in question, permitting states to exclude from receiving AFDC-E benefits children of fathers who were unemployed because of participation in a labor dispute or because they were disqualified for unemployment compensation under state law.[5] The amended HEW regulation had the effect of resurrecting Rule 200.X.A.(2) which previously had been invalidated by the *Francis I* decision. Accordingly, the Attorney General of Maryland filed a motion in the *Francis I* case, seeking to dissolve the injunction which the Court had entered. The State contended that Rule 200.X.A.(2), to the extent that it denied benefits to children of fathers who were unemployed because of a misconduct discharge or participation in a labor dispute, was a valid exercise of Maryland's rule-making authority pursuant to the amended HEW regulation.

A further hearing was held, and in another opinion written by Judge Kaufman the Court held that the

[4] Judge Kaufman reasoned as follows: "Thus, HEW used mandatory language, i. e., that the state plan *must* include any father who is employed less than a given number of hours. There is nothing in the regulation which permits a state plan to deny benefits under the state's AFDC-E program, on the ground that the father of the needy child is unemployed because his discharge from employment was due to his own misconduct. Such a father is clearly not employed. Consequently, Maryland Rule 200.X.A.(2), insofar as it attempts to transplant, within the framework of Maryland's AFDC-E program, the disqualification requirements of sections 6(b) and/or (c) of the Maryland Unemployment Compensation law, is violative of HEW's regulation." 340 F. Supp. at 365. Employing like reasoning, the Court further found that the HEW regulations in question required a "similar holding with regard to Maryland's denial of AFDC-E benefits to those out of work because of labor disputes." 340 F. Supp. at 366.

[5] See amendment to 45 C.F.R. § 233.100(a) (1), effective July 12, 1973.

amended HEW regulation was invalid because of a conflict with 42 U.S.C. § 607 and that Rule 200.X.A.(2) was also invalid because it was based on such regulation. Francis v. Davidson, 379 F. Supp. 78 (D. Md. 1974) (hereinafter *Francis II*). In denying the motion to dissolve the injunction, the Court in *Francis II* reaffirmed its previous holding that the children of fathers who were discharged from employment because of misconduct or who were unemployed because of a labor dispute were entitled to receive AFDC-E benefits notwithstanding the fact that their fathers were not entitled to unemployment compensation under Maryland law.

[1] The present action was filed August 29, 1973. The plaintiffs in this suit have brought a class action[6] for declaratory and injunctive relief as well as money damages[7] under 42 U.S.C. § 1983, naming as defendant the Secretary of the Maryland Department of Employment and Social Services. In this case, plaintiffs challenge Rule 200.X.A.(2) insofar as it denies benefits to yet another class of children, namely the children of fathers who are not eligible for unemployment compensation under Maryland law because they have voluntarily quit their jobs.[8] As in *Francis I*, plaintiffs here assert both the constitutional claim that the Maryland Rule denies them equal protection of the laws under the

[6] Defendant has agreed that this case may properly proceed as a class action.

[7] Plaintiffs concede that they are not entitled to money damages from the individual defendant or from the State of Maryland. It is further conceded by plaintiffs that they are not entitled to AFDC-E benefits retroactively to the date of the filing of this action, should this Court rule in their favor. See Edelman v. Jordan, 415 U.S. 651, 94 S. Ct. 1347, 39 L. Ed. 2d 662 (1974).

[8] A provision of Maryland's Unemployment Insurance Law which was not before the Court in *Francis I* and *Francis II* disqualifies an individual from unemployment insurance benefits if he is unemployed "due to his leaving work voluntarily without good cause." Annotated Code of Maryland, Art. 95A, § 6(a) (1969 Repl. Vol.)

Fourteenth Amendment and the statutory claim that the Rule is in conflict with 42 U.S.C. § 607.

[2] In the original complaint, plaintiffs sought the convening of a three-judge court. However, since this action was filed, the Supreme Court has decided Hagans v. Lavine, 415 U.S. 528, 94 S. Ct. 1372, 39 L. Ed. 2d 577 (1974). Under that decision, it is clear (and the parties have so conceded) that a single district judge can decide whether a constitutional claim such as plaintiffs' here is of sufficient substance to support federal jurisdiction. 415 U.S. at 536, 94 S. Ct. 1372. If the single judge finds a constitutional claim such as this one to be insubstantial or frivolous, the case should be dismissed. But if the single judge finds such constitutional claim to be not insubstantial, he may go on to decide the pendent statutory claim without having to convene a three-judge court. 415 U.S. at 543-545, 94 S. Ct. 1372.

Plaintiffs have moved for summary judgment, claiming that there is no genuine issue as to any material fact and that as a matter of law, Maryland Rule 200.X.A.(2) is invalid as it applies to them. Defendant has filed an opposition to such motion and a separate motion to dismiss this action on the ground that this Court lacks jurisdiction because plaintiffs' equal protection claim does not present a "substantial" constitutional question which would support jurisdiction under 42 U.S.C. § 1983 and 28 U.S.C. § 1343(3) and because there is no other basis for federal jurisdiction here.

I.

[3] The first inquiry of the Court in this case is whether there is federal jurisdiction, and determination of this question depends on the sufficiency of plaintiffs' constitutional claim. Rule 200.X.A.(2) can withstand constitutional challenge if there is a rational basis for treating plaintiffs' class differently from others who receive these benefits under Maryland law. Dandridge v. Williams, *supra*. Plaintiffs contend that it is not a rational distinction for Maryland to deny them benefits while granting benefits to children of fathers who are

eligible for unemployment insurance but have exhausted those benefits, who are temporarily disabled, who are underemployed as defined by federal law, who are ineligible for unemployment compensation because they have been involved in a labor dispute, and who are similarly ineligible because they have been discharged for misconduct. In particular, plaintiffs argue that it is unreasonable for the State to make the payments required by *Francis I* and *Francis II* to those children whose fathers are in the last two categories mentioned above but deny benefits to the children of fathers who are unemployed because they voluntarily quit their jobs.

In reply, defendants contend that plaintiffs have not alleged a sufficiently substantial equal protection claim because a three-judge panel of this Court in *Francis I* previously rejected on the merits a similar challenge to the same Rule. It is further argued that this is a welfare case like Dandridge v. Williams, *supra*, and that the decision of the Supreme Court in that case demonstrates that plaintiffs' constitutional claim here is "obviously without merit."

Pertinent to the question of jurisdiction before the Court is the very recent decision of the Supreme Court in Hagans v. Lavine, *supra*. In that case, recipients of benefits under the AFDC program brought a class action for declaratory and injunctive relief challenging a New York welfare regulation under which the State recouped prior emergency rent payments from subsequent AFDC grants. As here, the plaintiffs asserted a constitutional claim under the equal protection clause and a pendent statutory claim based on an alleged conflict between state and federal law. The Supreme Court, in reversing the Second Circuit, held that plaintiffs had alleged a substantial equal protection claim sufficient to confer jurisdiction under 28 U.S.C. § 1343(3) because no prior controlling decision of the Court had dealt with that or any similar regulation, and because it was not "immediately obvious" from the face of the complaint that the recoupment regulation was so "patently rational as to require no meaningful consideration" by the district court. 415 U.S. at 540-541,

94 S. Ct. at 1381. In *Hagans*, the Supreme Court referred to Ex parte Poresky, 290 U.S. 30, 54 S. Ct. 3, 78 L. Ed. 152 (1933) as one of the principal decisions on the subject before the Court and quoted from pages 31-32 of that opinion, as follows (415 U.S. at 537, 94 S. Ct. at 1379):

> [i]n the absence of diversity of citizenship, it is essential to jurisdiction that a substantial federal question should be presented; * * * The question may be plainly unsubstantial, either because it is "obviously without merit" or because "its unsoundness so clearly results from the previous decisions of this court as to foreclose the subject and leave no room for the inference that the question sought to be raised can be the subject of controversy."

In *Hagans*, the Supreme Court further said (415 U.S. at 538-539, 94 S. Ct. at 1380):

> Here, §1343(3) and §1983 unquestionably authorized federal courts to entertain suits to redress the deprivation, under color of state law of constitutional rights. It is also plain that the complaint formally alleged such a deprivation. The District Court's jurisdiction, a matter for threshold determination, turned on whether the question was too insubstantial for consideration.

Applying the *Hagans* rationale to plaintiffs' equal protection claim here, this Court in making the required threshold determination cannot say that this claim is too insubstantial for consideration. Of course, as defendant points out, a three-judge panel of this Court in *Francis I* considered on its merits and rejected an equal protection claim similar to the one here asserted. However, there are significant differences between the constitutional claim asserted in *Francis I* and the one pressed here. In *Francis I*, this Court was careful to note that the equal protection claim there went to the constitutionality of the applicatiom of Rule 200.X.A.(2) to only two classes of unemployed fathers, i.e., strikers and those guilty of misconduct. This Court said (340 F. Supp. at pages 364-365):

> The specific issue which accordingly is presented herein as whether gross misconduct and discharge or suspension as a disciplinary measure, or disqualification because of involvement in a labor dispute, can be made disqualifications in a state's AFDC-E program, without that state violating federal statutory and/or regulatory requirements.

Thus, this Court's decision as to the constitutional issue in *Francis I* was limited to consideration of the rationality of the application of Rule 200.X.A.(2) to strikers and those guilty of misconduct. Plaintiffs' present claim that there is no rational basis for Maryland's denial of benefits to children of fathers who have voluntarily quit work was not before nor considered by this Court in *Francis I.*

Plaintiffs' equal protection claim in this case is in a significantly different posture than the similar claim asserted by plaintiffs in *Francis I.* This Court has now held in *Francis II* that Rule 200.X.A.(2) is invalid because the HEW regulation upon which it is based is also invalid. Children of fathers who are out of work due to misconduct or a labor strike are now entitled to those benefits. Apparently, plaintiffs, who are unemployed because they quit their jobs, are the only group of such fathers whose children do not receive similar benefits. Their equal protection claim here is therefore much stronger now than it would have been at the time it was considered by this Court in *Francis I.* At that time, there were several different classes which were being denied benefits. Even then, this Court found that the constitutional claim asserted was not frivolous but was sufficient to support federal jurisdiction.

Accordingly, this Court concludes that plaintiffs' equal protection claim is not obviously without merit. It is not immediately obvious to this Court from the face of the complaint that the denial by Rule 200.X.A.(2) of AFDC-E benefits to children of fathers who have voluntarily quit work is so patently rational as to require no meaningful consideration.[9] See Hagans v. Lavine, *supra*, 415 U.S. at 539-541, 94 S. Ct. 1372.

[9] Defendant has not argued, in the alternative, under Ex parte Poresky, *supra*, that plaintiffs' equal protection claim

[4] This is not to say that plaintiffs will probably prevail on the merits were their constitutional claim to be presented to a three-judge court. Under *Hagans*, the only question before this single district judge is whether the complaint on its face asserts a constitutional claim which is sufficiently substantial to support federal jurisdiction, not whether the plaintiffs will ultimately prevail on the merits. Most of defendant's arguments are addressed to the merits themselves, an issue which is not properly before this single district judge. As the Supreme Court said in *Hagans, supra* (415 U.S. at 542, 543, 94 S. Ct. at 1381, 1382):

> This reasoning with respect to the rationality of the regulation and its propriety under the Equal Protection Clause may ultimately prove correct, but it is not immediately obvious from the decided cases or so "very plain" under the Equal Protection Clause.
>
> * * * * * *
>
> Nor can we say that petitioners' claim is "so insubstantial, implausible, foreclosed by prior decisions of this Court or otherwise completely devoid of merit as not to involve a federal controversy within the jurisdiction of the District Court, whatever may be the ultimate resolution of the federal issues on the merits." Onedia Indian Nation v. County of Oneida, 414 U.S. 661, 666-667 [94 S. Ct. 772, 777, 39 L. Ed. 2d 73] (1974).

has been foreclosed because the Supreme Court's summary affirmance of *Francis I* represents controlling decision on the merits. It is doubtful that a *per curiam* opinion summarily affirming a decision of a three-judge court would amount to a decision of the Supreme Court foreclosing the subject and leaving no room for the inference that the questions sought to be raised can be the subject of controversy. See Goosby v. Osser, 409 U.S. 512, 93 S. Ct. 854, 35 L. Ed. 2d 36 (1973); Hagans v. Lavine, *supra*, 415 U. S. at 537-538, 94 S. Ct. 1372. In any event, the countervailing argument can be made that the Supreme Court's summary affirmance approved this Court's conclusion in *Francis I* that the constitutional claim was sufficiently substantial to establish federal jurisdiction. It would certainly be an anomalous result for this Court to now find no federal jurisdiction *because of the Francis I* decision when this Court in *Francis I* held that it had jurisdiction over an almost identical claim.

Nor does Dandridge v. Williams, *supra*, foreclose plaintiffs' constitutional claim here. Defendant contends that the Supreme Court's decision in *Dandridge* establishes a principle of constitutional law which defeats plaintiffs' equal protection claim here. It is asserted that the Court, in recognizing the wide latitude states have in the area of economic regulation and in promoting social welfare, required a high degree of judicial restraint in this area and placed a very substantial burden on plaintiffs who seek to strike down state welfare regulations on equal protection grounds. These arguments were fully answered by the Supreme Court in *Hagans*, when it said (414 U.S. at page 539, 94 S. Ct. at page 1380):

> But *Dandridge* evinced no intention to suspend the operation of the Equal Protection Clause in the field of social welfare law. State laws and regulations must still "be rationally based and free from invidious discrimination." *Id.*, 397 U.S. at 487 [90 S. Ct. at 1162].

Under the facts and circumstances of this case, plaintiffs have asserted a sufficient constitutional challenge to Rule 200.X.A.(2) for purposes of establishing federal jurisdiction. In making the threshold determination whether that challenge is sufficiently substantial, this Court does not address itself to the merits. The ultimate effect of *Dandridge* on the merits of the constitutional claim advanced here is not for this single district judge to decide.

II.

Having determined that he has jurisdiction, this single judge may now proceed to adjudicate plaintiffs' pendent statutory claim without convening a three-judge court. Plaintiffs allege that as applied to them, Rule 200.X.A.(2) is in conflict with 42 U.S.C. § 607. A similar question was decided by the Court in *Francis II*, and what this Court must now determine is whether the reasoning adopted by that three-judge court would

apply to children of fathers who have voluntarily quit work as well as to children of fathers unemployed because of a labor dispute or because of misconduct.

[5] Defendant contends first that *Francis II* was wrongly decided and should not be followed by another judge of this Court. The undersigned does not agree. The conclusions reached by the unanimous three-judge court in *Francis II* are soundly supported by the reasons set forth in that opinion. Nor should this Court decline to follow *Francis II* merely because that decision has been appealed to the Supreme Court. If the Supreme Court reverses *Francis II*, defendant should of course ask this Court to reconsider the decision rendered in this case.[10]

[6, 7] Defendant next argues that *Francis II* is not controlling here because the facts are different and because a different provision of Maryland's a unemployment law is involved. Admittedly, *Francis II* dealt with the application of Rule 200.X.A.(2) to children of fathers who were discharged because of misconduct or who were unemployed because of a labor dispute. But the finding in *Francis II* that the Maryland Rule conflicted with federal law as applied in those two situations, likewise is determinative here. Just as "a father who is discharged for cause by his employer *is* unemployed" (379 F. Supp. at 81), so a father who voluntarily quits his job is unemployed within the meaning of 42 U.S.C. §607(a). The federal statute provides benefits for a needy child who has been deprived of parental support or care by reason of the unemployment of the father. Until Congress amends the statute, "no combination of federal and state regulations may provide that a father who is unemployed is not unemployed." *Francis II, supra* at 81. Because the federal regulation relied upon by defendant is incompatible with the federal statute, the Maryland Rule itself is likewise invalid as applied to the children of fathers who voluntarily quit their jobs.

[10] Of course, an appeal in this case would present the issues raised herein to the United States Court of Appeals for the Fourth Circuit. Such an appeal would permit the Fourth Circuit to review the soundness of the *Francis II* decision.

III.

For these reasons, defendant's motion to dismiss is denied and plaintiffs' motion for summary judgment is granted. As the Court held in *Francis I*, plaintiffs and their class are here entitled only to appropriate prospective relief. Counsel should submit an Order prepared in accordance with the findings and conclusions contained herein.

JUDGMENT

In the United States District Court
For the District of Maryland

Civil Action No. 73-874-H
Barry Bethea, et al.,
Plaintiffs,
v.
David T. Mason,
Defendant.

Plaintiffs having moved this court to request the convening of a three-judge court, to grant them summary judgment and for class certification, and defendant having moved the court to dismiss the complaint in the case, and

Upon consideration of the above motions and their supporting and opposing memoranda and the memorandum amicus curiae filed on behalf of the United States Department of Health, Education, and Welfare, and

In accordance with the terms of the written opinion of this court filed in this case on November 27, 1974, it is hereby

ORDERED that plaintiffs' motions for class certification and summary judgment be and are hereby GRANTED, and plaintiffs' request for the convening of a three-judge court and defendant's motion to dismiss the complaint be and are hereby DENIED, and it is further

ORDERED that this action is certified as a class action brought by a class of plaintiffs consisting of all fathers and their children who have been or would be found ineligible by the Maryland Department of Employment and Social Services for public assistance benefits and services under Section 407 of the Social Security Act (relating to Aid to Families with Dependent Children and Employable Fathers) because the fathers have been found ineligible for unemployment insurance benefits due to having voluntarily quit their prior employment, and it is further

DECLARED that Maryland Department of Employment and SOCIAL Services Rule 200.X.A.(2) as applied to the above class is in conflict with the terms of Section 407 of the Social Security Act and therefore invalid, and it is further

ORDERED that, as of the date of this order, the defendant Secretary of the Maryland Department of Employment and Social Services, his successors in office, agents, employees, and all other persons in concert and participation with him pay benefits under Section 407 of the Social Security Act to all persons in the above class who would be eligible for these benefits but for the fact that they are ineligible to receive unemployment compensation due to having voluntarily quit their prior employment.

Dated in Baltimore, Maryland this 12th day of December 1974.

ALEXANDER HARVEY, II,
United States District Judge.

David T. Mason, etc., et al.,
Appellants.

v.

Robert Francis, etc., et al.
No. 74-326.

Appeal from the United States District Court for the District of Maryland.

Facts and opinion, Francis v. Davidson, D.C., 379 F. Supp. 78.

Dec. 9, 1974. Motion of appellee Francis for leave to proceed *in forma pauperis* granted. The appeal is dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari before judgment, certiorari denied.

United States Court of Appeals
For the Fourth Circuit

No. 74-1991

Robert Francis, individually and on behalf of his minor children, Robert J. Francis, Mary P. Francis, Elizabeth S. Francis, Michael J. Francis, James J. Francis, and Veronica H. Francis, individually and on behalf of all other persons similarly situated; Edward Wright, individually and on behalf of his minor child, Edward Wright, Jr., individually and on behalf of all other persons similarly situated,

Appellees,

v.

The Chamber of Commerce of The United States of America,

Appellant.

No. 74-1992

Robert Francis, individually and on behalf of his minor children, Robert J. Francis, Mary P. Francis, Elizabeth S. Francis, Michael J. Francis, James J. Francis, and Veronica H. Francis, individually and on behalf of all other persons similarly situated; Edward Wright, individually and on behalf of his minor child, Edward Wright, Jr., individually and on behalf of all other persons similarly situated,

Appellees,

v.

David T. Mason, Secretary of the Department of Employment and Social Services,

Appellant.

Appeals from the United States District Court for the District of Maryland, at Baltimore. Winter, Circuit Judge, Kaufman and Young, District Judges.

No. 75-1165

Barry Bethea, Individually and on behalf of his minor child, Barry Bethea, Jr., Individually and on behalf of all persons similarly situated,

Appellees,

v.

Richard A. Batterton, Secretary, Department of Employment and Social Services, Individually and in his official capacity,

Appellant.

Appeal from the United States District Court for the District of Maryland, at Baltimore. Alexander Harvey, II, District Judge.

(Argued July 9, 1975 Decided Sept. 22, 1975)

Before CRAVEN, BUTZNER, and FIELD, Circuit Judges.

Theodore Losin, Assistant Attorney General of Maryland, (Francis B. Burch, Attorney General of Maryland, and Joel J. Rabin, Assistant Attorney General of Maryland, on brief) for Appellants in Nos. 74-1992 and 75-1165; Gerard C. Smetana, (Burt A. Braverman, William H. DuRoss, III; Borovsky, Smetana, Ehrlich and Kronenberg; Milton Smith, General Counsel, and Richard B. Berman, Labor Relations Counsel, United States Chamber of Commerce, on brief) for Appellant in No. 74-1991; C. Christopher Brown for Appellees.

PER CURIAM:

In *Francis v. Davidson,* 340 F. Supp. 351 (D. Md. 1972), *aff'd* 409 U.S. 904, a three-judge court held that a Maryland regulation denying aid for dependent children benefits to persons who were ineligible for Maryland unemployment compensation was invalid because of the supremacy clause. Maryland had undertaken to deny benefits to families in which the father was unemployed because of being fired for misconduct or because of participation in a labor dispute. The controlling HEW regulation defined "unemployed father" in terms of hours worked without reference to any reason or reasons for unemployment.

After that decision, HEW changed its regulation to suit the state, and provided that the hours of work standard "need not include a father whose unemployment results from participation in a labor dispute or who is unemployed by reason of conduct or circumstances which result or would result in disqualification for unemployment compensation under the state's unemployment compensation law." The Secretary's new regulation left it to the state whether or not to adopt a straight number of hours worked test or to exclude those who were out of work because of a strike or misconduct. Maryland opted for exclusion.

Nos. 74-1991 and 74-1992 present the question of whether the Congress authorized the Secretary to leave to the states the definition of unemployment or whether he must, instead, establish a national definition. We agree with the district court that the Secretary's regulation of July 12, 1973, authorizing Maryland to determine for itself whether to disqualify certain breadwinners is contrary to the authorizing legislation.

We reject the contention of the Chamber of Commerce that we should undertake to resolve what the Chamber considers to be an intolerable tension between Aid for Dependent Children (of parents involved in a labor dispute) and the National Labor Relations Act. We do not view the national labor policy and the national social policy as irreconcilable, but if they are so viewed, there is presented a policy question for the Congress that is not for us to decide.

For the reasons stated by Judge Kaufman for the three-judge court, we affirm the decision below that Maryland may not exclude from the benefits of AFDC those children whose fathers are out of work because of as strike or misconduct. We adopt the opinion of the district court as our own.[1] 379 F. Supp. 78 (D.

[1] Since we heard argument we have been advised by the assistant general counsel to the Secretary that HEW has now determined that it should issue national standards which the court below held were required by the statute. He also advises that the Secretary has accepted the decision below with respect to persons fired for misconduct and intends to withdraw from the states the option of excluding such fathers from the AFDC program. Counsel stresses that the Secretary's intention has not yet been implemented and that proposed regulations have not yet been adopted.

Md.), *appeal dismissed and cert. denied*, 419 U.S. 1042 (1974).[2]

In No. 75-1165 the question is whether Maryland may exclude children of fathers who quit work from the benefits of AFDC. We agree with Judge Harvey that such children are entitled to the benefits provided by the Congress, and we adopt his opinion as our own. 384 F. Supp. 1274 (D. Md. 1974).

The decisions below will be

Affirmed.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

Supreme Court of the United States

No. A-468

Richard A. Batterton, Etc. et al.,
Petitioners,
v.
Robert Francis, Etc., et al.

Upon Consideration of the application of counsel for petitioner(s),

It is Ordered that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including February 19, 1976

/s/ WARREN E. BURGER,
Chief Justice of the United States.

Dated this 20th day of November, 1975

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

Supreme Court of the United States

No. A-508

Chamber of Commerce of the United States,
Petitioner,
v.
Robert Francis, et al.

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitl d cause be, and the same is hereby, extended to and including February 19, 1976.

/s/ WARREN E. BURGER
Chief Justice of the United States.

Dated this 4th day of December, 1975.

United States Court of Appeals
Fourth Circuit

September 22, 1975

To: Theodore Losin, Esquire; Francis B. Burch, Esquire; Joel J. Rabin, Esquire; Diana G. Motz, Esquires; Gerald C. Smetana, Esquire; James P. Garland, Esquire; Milton A. Smith, Esquire; Richard B. Berman, Esquire; C. Christopher Brown, Esquire

CLERK'S MEMORANDUM

In compliance with Rule 36 and 45(c) of the Federal Rules of Appellate Procedure, you are advised that the judgment in case no. 74-1991, 74-1992 was entered this date. A copy of the court's opinion, and a blank bill of costs (omitted in criminal cases) is enclosed.

I would invite your particular attention to Rules 39(c), 40(a), and 41(b) of the Federal Rules of Appellate Procedure.

WILLIAM K. SLATE, II
Clerk.

Encls.

ORDER

In the United States District Court
For the District of Maryland

Civil No. 71-853-K

Robert Francis, et al,
Plaintiffs,

v.

David T. Mason, et al,
Defendants.

Upon full consideration of the Motions to Intervene and supporting Memoranda filed on behalf of the *amicus curiae*, The Chamber of Commerce of The United States of America, pursuant to Rule 24(a) and (b), F.R.C.P. as well as the opposition filed on behalf of Plaintiff, this Court hereby grants the Chamber's

Motion to Intervene as a party in the above captioned proceedings.

/s/ [illegible]
United States District Judge
/s/ [illegible]
United States District Judge
/s/ [illegible]
United States District Judge

Dated this 31st day of January, 1974.

United States Court of Appeals
for the Fourth Circuit

Robert Francis, et al.,
Appellees,

v.

The Chamber of Commerce of the United States,
Appellant.

Appeal from the United States District Court for the District of Maryland, at Baltimore. (Three-judge court) Winter, Circuit Judge, Kaufman and Young, District Judges.

(Argued February 6, 1973) (Decided June 20, 1973.)

Before HAYNSWORTH, *Chief Judge*, and RUSSELL and WIDENER, *Circuit Judges*.

WIDENER, *Circuit Judge:*

The United States Chamber of Commerce appeals to this court after being denied leave to permissively intervene in litigation before a three-judge district court in *Francis v. Davison*, 340 F. Supp. 351 (D. Md. 1972), *summarily affirmed without opinion*, ___ U.S. ___ 93 S. Ct. 223 (1972). The Chamber argues that it should have been allowed to intervene as of right under FRCP 24(a), or alternatively, that the district court abused its discretion in denying it permissibe intervention under

FRCP 24(b). We find no merit in the contentions set forth by the Chamber and dismiss the appeal.

The original action was brought by the plaintiffs against state officials to have the state officials enjoined from enforcing a state regulation that prevented plaintiffs from receiving AFDC-E benefits.[1] They alleged that the Maryland procedure violated an HEW regulation, 45 CFR § 233, 100(a), and that it denied them equal protection under the Fourteenth Amendment. The District court rejected the equal protection argument. 340 F. Supp. 351, 363-364. The court held, however, that the Maryland procedure did violate the HEW regulations and, therefore, plaintiffs were entitled to AFDC-E benefits. 340 F. Supp. 351, 364-371.

The Chamber sought to participate in the above litigation as an intervenor or, alternatively, as *amicus curiae.* The Chamber sought to advance the argument that the Maryland precedure was valid because, by reason of the Supremacy Clause of the Constitution and the national labor policy, a state was obligated to deny AFDC-E benefits to strikers in order not to violate an employer's right to bargain collectively, free from state interference. The district court allowed the Chamber to file an *amicus* brief and to take part in oral argument,

[1] AFDC-E is a program providing aid for children in a family in which the father is unemployed. See 42 USC § 607. The program is administered by the States under regulations promulgated by the Department of Health, Education and Welfare (HEW). See 45 CFR § 233, et seq, especially 45 CFR § 233.100(a)(1). In the instant case, Francis was denied AFDC-E benefits under Rule 200 X.A. of the Social Services Administration, Department of Employment and Social Services, of the State of Maryland, because he did not qualify for unemployment insurance under Maryland law. He did not qualify for unemployment insurance because he was on strike. See Md. Ann. Code 95A, § 6(e), (1969 Repl. Vol.). Being qualified for unemployment insurance was a prerequisite to receiving AFDC-E benefits under Maryland Rule 200 X.A. For a more complete explanation of the background, see *Francis v. Davidson, supra.*

but it denied the Chamber's petition for permissive intervention under FRCP 24(b).[2]

We are of opinion that this court has jurisdiction to hear this appeal. 28 USC § 1253 allows a direct appeal to the United States Supreme Court only in cases where a properly convened three-judge district court has either granted or denied an injunction. Since the instant appeal is from a denial of a petition for intervention and not from the denial of an injunction, we believe this is the proper forum in which to contest the decision. See Mr. Justice Douglas' dissent in *Oregon State Elks Ass'n, v. Falkenstein,* ___ U.S. ___, 41 L.W. 3312 (No. 72-640, December ___, 1972); Cf. *Mitchell v. Donovan,* 398 U.S. 427, 90 S. Ct. 1763, 26 L.E.(2d) 378 (1970).

The Chamber's first contention is that the district court should have allowed it to intervene as a matter of right under FRCP 24(a).[3] However, it did not petition for leave to intervene under Rule 24(a) and never brought this matter to the attention of the district court. Under these circumstances, it may not now assert this contention for the first time in this court. *McGowan v. Gillenwater,* 429 F.(2d) 586 (4th Cir. 1970). Therefore, we reject this contention.

The Chamber's next argument is that since it met all the requirements of Rule 24(a), it was an abuse of discretion by the district court not to allow it to permissively intervene under Rule 24(b).[4] We believe this position to be without merit.

[2] *Francis v. Davidson, supra.* 340 F. Supp. 355 fn. 7.

[3] Rule 24. Intervention.
"(a) INTERVENTION OF RIGHT. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may, as a practical matter, impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties."

[4] Rule 24(b):
"(b) PERMISSIVE INTERVENTION. Upon timely application anyone may be permitted to intervene in an action: (1) when

While we acknowledge the rule that a denial of permissive intervention may be reversed only for an abuse of discretion by the district court,[5] we do not believe such abuse existed in this case. Assuming, without deciding, that the Chamber established independent jurisdictional grounds to support its defense[6]

a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order, administered by a federal or state governmental officer or agency or upon any regulation, order, requirement, or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties."

See *Wolpe v. Poretsky,* 144 F.(2d) 505, esp. 508 (D.C. Cir. 1944).

[5] See *Railroad Trainmen v. B&O Railroad,* 331 U.S. 519, 524 (1947); *Allen Co. v. Cash Register Co.,* 322 U.S. 137, 142, 64 S. Ct. 905, 88 L. Ed. 1188 (1944); *State of North Carolina v. Southern Ry. Co.,* 30 F.)2d) 204 (4th Cir. 1929), cert. den. 279 U.S. 858, 49 S. Ct. 352, 73 L. Ed. 999 (1929); *Martin v. Kalvar Corporation,* 411 F.(2d) 552 (5th Cir. 1969); 7A Wright & Miller, *Federal Practice and Procedure,* § 1923, pp. 630-632. But, see *Radford Iron Co. v. Appalachian Electric Co.,* 62 F.(2d) 940 (4th Cir. 1933), cert. den. 289 U.S. 748, 53 S. Ct. 691, 77 L. Ed. 1494 (1933).

[6] When a party seeks permissive intervention, as here, he must generally establish independent jurisdictional grounds to support his claim or defense. *Babcock & Wilcox Company v. Parsons Corporation,* 430 F.(2d) 531 (8th Cir. 1970) and cases cited therein; see *Beard-Laney, Inc. v. Pressley,* 18 FRD 162 (W.D. S.C. 1955). 7A Wright & Miller, *Federal Practice and Procedure,* § 1917. There are exceptions to this general rule, but it is doubtful that the Chamber comes within them. See *Wright & Miller,* supra, for an explanation of the exceptions to the rule.

and alleged a sufficient interest[7] in the transaction which was the subject of the litigation in the district court, we do not believe that it is so situated that the disposition of the matter will, as a practical matter, impair or impede its ability to protect its interest.[8]

The Chamber admits that if the decision of the district court is sustained, it will not be precluded from later pressing its interests in another suit. It contends that even though it is not bound by the decision it will be disadvantaged in any further suit which it might bring because the district court's ruling would influence the court in which the new suit would be brought. The Chamber also says that a new action will be difficult to initiate because the mootness doctrine enunciated by

[7] We question whether the Chamber sufficiently alleged a significantly protectable interest in the litigation in this case so as to come within the interest requirement of Rule 24(a). See *Donaldson v. United States,* 400 U.S. 517, 531, 91 S. Ct. 534, 27 L. Ed. (2d) 580 (1971). We also question the Chamber's standing to intervene as a part under *Sierra Club v. Morton,* 405 U.S. 727, 92 S. Ct. 1361, 31 L. Ed. (2d) 636 (1972), since it failed to allege or show that any of its members were engaged in a strike with their employees and that some of these employees were eligible for AFDC-E benefits. However, since we believe that the Chamber fails to meet the practical impairment requirement of Rule 24(a), we do not reach the merits of the above issues.

[8] This is a requirement of Rule 24(a). Prior to the 1966 amendment of Rule 24, the rule was that a party could not intervene under 24(a) unless it might be bound by the judgment in the pending action. The term bound was interpreted to mean bound in the *res judicata* sense. The Rule now requires only that the "disposition of the action may as a practical matter impair or impede his (the applicant's) ability to protect that interest." This was designed to liberalize the right to intervene in federal actions. Thus, in a proper case, *stare decisis* by itself may furnish the practical disadvantage required under 24(a). See *Nuesse v. Camp,* 385 F.(2d) 694, 701 (D.C. Cir. 1967); 7A Wright & Miller, *Federal Practice and Procedure,* § 1908. However, we do not think that the present controversy is such a case. We especially note that there is no class of defendants of which the Chamber is a member.

the Third Circuit in *Super Tire Engineering Co. v. McCorkle,* 469 F.(2d) 911 (3rd Cir. 1972), would require an in-progress strike of sufficient duration to permit the completion of a trial and an appeal.

The answer to the above contentions is that the district court's ruling on the Chamber's *amicus* argument was, at most, mere *dicta* and not binding on anyone. The district court did not rule on the merits of the Chamber's contention; its only *holding* was that the Chamber would not be permitted to intervene. In view of the fact that the district court's discussion of the Chamber's position was *dicta*[9], we fail to see how it might be impaired or impeded in asserting its position in some future litigation. Cf. *Credits Commutation Co. v. United States,* 177 U.S. 311, 20 S. Ct. 636, 44 L. Ed. 782 (1900). Concerning the mootness issue, we express no view at this time as to the correctness of the decision in *Super Tire Engineering Co., supra.* Thus, the Chamber must only meet the requirement of Article III of the Constitution and present "a case or controversy" to the court in any future litigation. Since this is a burden that rests upon every party involved in litigation in a federal court,[10] we do not feel it too heavy. Accordingly, we believe that the Chamber failed to meet the practical impairment requirement of Rule 24(a). Its contention that the district court abused its discretion by denying permissive intervention because it met the requirements of Rule 24(a) must fail.

The Chamber's final argument is that, even if it did not meet the requirements of Rule 24(a), the district court abused its discretion by rejecting the Chamber's position and then denying it party status. It apparently argues that the district court ruled on the merits of its position. As we said above, the district court held only

[9] "The permissive nature of such intervention necessarily implies that, if intervention is denied, the applicant is not legally bound or prejudiced by any judgment that might be entered in the case." *Railroad Trainmen v. B&O Railroad,* 331 U.S. 519, 524 (1947).

[10] See *North Carolina v. Rice,* 404 U.S. 244, 92 S. Ct. 402, 30 L. Ed. (2d) 413 (1971).

that the Chamber's position did not warrant permissive intervention. Cf. *Credits Commutation Co., supra.* Anything said there with regard to the Chamber's substantive position was *dicta.* The Chamber failed to demonstrate how its interest has been prejudiced or how the district court abused its discretion.

We are of opinion the statement by the Supreme Court in *Sutphen Estates v. United States,* 342 U.S. 19 (1941), should apply here:

> "Permissive intervention is governed by Rule 24(b). But we have said enough to show that the claim of injury to appellant is too speculative and too contingent on unknown factors to conclude that there was an abuse of discretion in denying leave to intervene. The court had ample reason to prevent the administration of the decree from being burdened with a collateral issue that on this record can properly be adjudicated elsewhere." 342 U.S. 19, 23.

On the whole case, we are of opinion that the decision of the district court was not an abuse of its discretion under Rule 24(b). Accordingly, we dismiss the appeal.[11]

APPEAL DISMISSED

[11] See 7A Wright & Miller, *Federal Practice and Procedure,* § 1923, pp. 626-630.

PRE-HEARING MEMORANDUM FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA

In the United States District Court
For the District of Maryland

Civil Action No. 71-853-K

Robert Francis, et al,
Defendants,
v.
David T. Mason, et al,
Defendants.

Pursuant to Local Rule 9, the Chamber will briefly outline the issues that, it submits, require this Court's consideration: (1) whether the Secretary of H.E.W. has established proper "standards" within which the states may disburse A.F.D.C. benefits; and (2) whether, wholly apart from the disputed standards, the State of Maryland is still free to deny benefits to striking employees pursuant to other provisions of the same statute requiring recipients to accept available work. By arguing only these points, the Chamber does not, of course, waive its arguments previously made to this Court, particularly in light of a recent decision of the Supreme Court in *Super Tire Engineering Co. v. McCorkle,* ___ U.S. ___, 42 L.W. 4507 (April 16, 1974), viz: that the federal collecting bargaining scheme precludes the payments to striking employees at issue here. The Chamber will limit its presentation to the validity of Maryland's policy denying benefits to striking employees, and takes no position with regard to any other issues.

1. As this Court has already recognized, Congress delegated the "policy making function" of setting

standards to H.E.W., and its judgment must be given "considerable weight." *Francis v. Davidson,* 340 F. Supp. at 365; *Udall v. Tallman,* 380 U.S. 1 (1965). Absent a demonstration by Plaintiff that there are "compelling indications" (*New York State Dept. of Soc. Ser. v. Dublino,* ___ U.S. ___, 93 S. Ct. 2507, 2517 (1973)) that the Agency "is wrong" (*Ibid*), or draws unreasonable distinctions between classes, its interpretation must be sustained. Here no such "compelling indications" exist and, as this Court held, distinctions drawn with respect to striking employees are reasonable. Plaintiff's authorities are distinguishable since in those cases "state law exclude[d] people from A.F.D.C.-E benefits whom the Act *expressly provided would be eligible." Ibid.* This Court has rejected Plaintiff's current contentions twice and should adhere to that position.

2. Even assuming *arguendo* that Plaintiff is correct that the Secretary's regulations are improper, Maryland is still free to deny benefits to striking employees. To qualify for benefits an applicant cannot refuse work except for good cause." 42 U.S.C. § 607(b)(1)(b). Maryland is free to conclude that a striker's refusal to accept work at his federally guaranteed job does not fall within the "good cause" exception. A state's power to deny such benefits to strikers is made clear by the floor debates during the passage of the present statute. *Reply of the Chamber of Commerce,* pp. 8-7. Indeed, one commentator has even asserted that the work requirement precludes a state from ever granting benefits because the "good cause" exception was never intended to include strikers. *See Welfare for Strikers: I.T.T. v. Minter,* 39 *U. Chi. L.R.* 79, 90 (1972). Accordingly, even if this Court finds that the H.E.W. regulation is invalid, this Court's injunction must be modified to permit Maryland to deny the disputed benefits to striking employees pursuant to the work requirements of the federal statute, if it so wishes.

CONCLUSION

For each of the above reasons, this Court is requested to modify its injunction to permit the State of Maryland to deny benefits to striking employees.

Respectfully submitted,

(CERTIFICATE OMITTED IN PRINTING)

MOTION FOR INTERVENTION ON BEHALF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES

In the United States District Court
For the District of Maryland

Case No. 71-853-K

Robert Francis, et al,
Defendants,
v.
Rita C. Davidson, et al.,
Plaintiffs.

Pursuant to Rules 24(a) and (b) of the Federal Rules of Procedure, the Chamber of Commerce of the United States of America hereby moves to intervene in this case for the limited purpose of assuring that all interests will be adequately represented, should an appeal be taken by one of the present parties. In support of this motion, the Chamber states:

1. This Court previously enjoined the State of Maryland from refusing to grant certain federal welfare benefits to applicants who were unemployed due to their involvement in labor disputes. See *Francis v. Davidson,* 340 F. Supp. 351 (D.C. Md., 1972). The basis

for the Court's decision was that the Maryland eligibility rule conflicted with federal regulations governing the program. Because the federal regulations have since been amended to remove this conflict, Defendants have recently moved this Court to dissolve the previously issued injunction referred to, *supra.* The Chamber supports, adopts, and incorporates by reference that motion.

2. While Chamber does not intend to inject issues, it does seek to intervene at this stage of the proceedings for the limited purpose of protecting the unique economic stake of its membership in the event that one of the parties appeals this Court's decision on the pending motion. This Court has already recognized the interests of the Chamber by permitting it the status of an *amicus curiae* with full participatory rights. The question remains, however, whether the Chamber will be able to defend those same interests should either the State or the Plaintiffs appeal.[1] The Supreme Court has recognized that in the area of labor relations administrative agencies, such as defendants herein, are inadequate to protect simultaneously both private and public interests of aggrieved persons, such as the Chamber's membership. *Int'l Union, etc., Local 383 v. Scofield,* 382 U.S. 205, 217 n.7 (1965). See also, e.g., *Hodgson v. United Mine Workers of America,* 473 F.2d 118, 125 (1972); *Wolpe v. Poretsky,* 144 F.2d 505 (D.C. Cir. 1944); *Zuber v. Allen,* 387 F.2d 862 (D.C. Cir. 1967); *Smuck v. Hobson,* 408 F.2d 175 (D.C. Cir. 1969). In the past other courts have often recognized the benefit, if not necessity, of the Chamber's participation in order to protect the interests of employers generally and to insure a complete presentation of views which might

[1] Any "fear that . . . intervention would lead to a flood of intervenors . . . is . . . unfounded." Schapiro, *Some Thoughts On Intervention Before Agencies and Arbitrators,* 81 Harv. L. Rev. 721, 747 (1968). Naturally once the employers' interest represented by the Chamber is, in this Court's view, adequately represented, no other person can claim a "right" to intervene (See Rule 24(a), F.R.C.P.; *Textile Workers v. Allendale,* 226 F.2d at 768, n.10) or need be permitted to intervene. Rule 24(b), F.R.C.P.

not be presented by other parties. See, for example, *Grinnell Corp. v. Hackett, et al.*, 344 F. Supp. 749, rev'd 475 F.2d 499 (1st Cir. 1973); and *Russo v. Kirby*, 344 F. Supp, 122, *rev'd*, 453 F.2d 548 (2d Cir. 1971).

3. The stake of the Chamber's membership is clear. The Court's ruling on the pending motion to dissolve the injunction involved herein directly affects the relative collective bargaining strengths of management and unions. Accordingly, the result of this litigation will have a direct economic impact upon the Chamber's membership. See, *Dow Chemical Company and Chamber of Commerce v. Taylor*, ___ F. Supp. ___, 81 LRRM 2872 (E.D. Mich. 1972), and *Textile Workers v. Allendale*, 2226 F.2d 765 (D.C. Cir. 1955). The Chamber does not seek, however, to inject issues not now before the Court, but only to protect its membership's economic stake in these post-judgment proceedings, should an appeal be taken. See *Cascade Natural Gas Corp. v. El Paso Natural Gas Co.*, 386 U.S. 129 (1967) where the effect of economic competition was recognized as allowing intervention in post-judgment proceedings.

4. In light of the limited purpose of the Chamber's motion, i.e., to defend an appeal, no prejudice to the parties can result, and intervention should be permitted "as a matter of course." *Wolpe v. Poretsky*, 144 F.2d 505 (D.C. Cir. 1944). Indeed, alternatively an order conditioning the Chamber's intervention upon the filing of a notice of appeal by one of the other parties would be acceptable. Accordingly there could not exist any countervailing factors to preclude granting the instant motion.

WHEREFORE, The Chamber of Commerce of the United States of America respectfully urges that its motion for leave to intervene in this proceeding be granted.

Respectfully submitted,

(CERTIFICATE OMITTED IN PRINTING)

TRANSCRIPT OF PROCEEDINGS

In the United States District Court
For the District of Maryland

No. 71-853-K Civil

Robert Francis, et al.
v.
Rita C. Davidson, et al.

April 26, 1974

ROSE M. ELGIN
OFFICIAL REPORTER
327 U.S. Courthouse
111 N. Calvert Street
Baltimore, Maryland 21202
752-0717

* * * * * *

[57] in the background of every incipient labor contract.

JUDGE KAUFMAN: And where does that take you? In your memorandum, you have indicated that the McCorkle case buttresses the position you have taken.

MR. GOLDMAN: Right. All I'm really saying is this Court relied on the Minter decision and quoted from it. The part that this Court quoted stated there were two grounds for pre-emption. To simplify it, one was essentially where you have an area blocked and fully occupied, which is in effect the German type of supremacy.

Then you have a second. They refer to palpable infringement.

The obstacle that plaintiffs in cases like these are faced with, under the Minter and then the Grinnell decision, was the First Circuit attempted to require us to prove as a matter of fact, putting on strikers, putting on witnesses, that there was an effect. They wouldn't assume that the payment of money affects the course of human conduct, an assumption which underlies most various other aspects of law, such as criminal fines.

In Granite State, the Supreme Court recognized that if you fine an individual — it precluded the union from fining a striker crossing the picket line.

Payment of money to an individual affects human conduct. The Supreme Court finally has come out and said [58] there is no question about the effect, so what I argue now, or what I would argue if you should ever reach that point — and I would think it would require additional briefing, since the parties have not addressed the question — is that if the effect is now recognized, we now must face the question of whether it is a specific frustration of federal labor policy.

In Dublino, the Court refused to find pre-emption of the New York State work rules on a fully occupied theory but it remanded to the District Court on the question of specific conflicts.

What I'm saying here is the Super Tire case recognizes the fact that there could be a specific conflict here by eliminating the tremendous burden the First Circuit has put on us about having to prove as a matter of fact with witnesses and experts that there is an effect at all.

Now the Court must decide, if there is an effect, how that fits within that national labor policy. I won't go into that at any greater length. The Court, of course, will never reach that point if you decide in favor of the State of Maryland on either of the first two grounds, but if the Court does choose to rule adversely, I would think that this third ground should require additional briefing, since it hasn't been discussed by the parties in full briefs and the Super Tire decision is so recent.

JUDGE WINTER: All right, Mr. Goldman, do you have
* * *

* * * * * *

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE, SOCIAL AND REHABILITATION SERVICE
(45 CFR Part 233)

COVERAGE AND CONDITIONS OF ELIGIBILITY IN FINANCIAL ASSISTANCE PROGRAMS

AFDC—Definition of Unemployed Fathers

Notice of Proposed Rule Making

Notice is hereby given that the regulation set forth in tentative form below is proposed by the Acting Administrator of the Social and Rehabilitation Service with the approval of the Secretary of Health, Education, and Welfare. The purpose of the proposed regulation is to amend 45 CFR Section 233.100(a)(1) in two respects. First, the amended regulation withdraws from the States the option of excluding fathers who are unemployed because of conduct or circumstances which result or would result in disqualification for unemployment compensation. Such fathers must now be included. Second, the amended regulation requires that the State plan definition of "unemployed father" exclude those fathers whose unemployment results from participation in a labor dispute of such a nature that the father is not eligible for unemployment compensation under the State's unemployment compensation law.

The proposed regulation furnishes the States with a Federal standard for determining whether to include or exclude from ADFC-UF fathers who are unemployed as a result of participation in a labor dispute. The basis of this regulation is the statutory language of Section 407 of the Social Security Act, 42 U.S.C. Section 607, and the opinion of the United States District Court in the case of *Francis v. Davidson,* 379 F. Supp. 78 (D. Md., 1974), which is now on appeal to the United States Court of Appeals for the Fourth Circuit. The District Court held that under Section 407 of the Social Security Act, 42 U.S.C. Section 607, the Department had the

option of requiring States to include or exclude those out of work because of involvement in labor disputes, or to leave that decision to each State in accordance with appropriate standards established by the Secretary. The Court also held that those who had been discharged for cause were nevertheless unemployed and could not, under the statutory requirements, be considered otherwise. The court decision indicates that the Department should change the existing regulation and, by tying the eligibility for AFDC-UF of a father not working as the result of participation in a labor dispute to that father's eligibility for State unemployment compensation benefits, we will define the standards which the district court stated were required by statute. The Department intends to make the regulation effective on the date of its publication in final form.

Prior to the adoption of the proposed amended regulation, consideration will be given to any comments, suggestions or objections thereto which are received in writing by the Acting Administrator, Social and Rehabilitation Service, Department of Health, Education, and Welfare, P.O. Box 2372, Washington, D.C. 20013 on or before August , 1975. Comments will be available for public inspection in room 5225 of the Department's offices at 330 C Street, S.W., Washington, D.C. beginning approximately two weeks after date of publication, on Monday thru Friday of each week from 8:30 a.m. to 5:00 p.m. (area code 202/245/0950).

(Section 1102, 49 Stat. 647 (42 U.S.C. Section 1302)

(Catalog of Federal Domestic Assistance Program 13/761, Public Assistance-Maintenance Assistance (State Aid))

It is hereby certified that the economic and inflationary impacts of this regulation have been carefully evaluated in accordance with OMB Circular A-107.

Dated: July 25, 1975.

/s/ JOHN A. SVAHN
John A. Svahn
Acting Administrator, Social and Rehabilitation Service

Approved: August 4, 1975.

/s/ CASPAR W. WEINBERGER
Caspar W. Weinberger
Secretary

Section 223.100(a) of Part 233 of title 45 Code of Federal Regulations is amended by revising paragraph (a) to read as follows:

§ 233.00 Dependent Children of unemployed fathers:

(a) Requirements for State Plans. If a State wishes to provide AFDC for children of unemployed fathers, the State plan under Title IV — Part A of the Social Security Act must, except as specified in paragraph (b) of this section:

(1) Include a definition of an unemployed father which shall apply only to families determined to be needy in accordance with the provisions in § 233.20 of this chapter. Such definition must include any father who:

(i) Is employed less than 100 hours a month; or

(ii) Exceeds that standard for a particular month, if his work is intermittent and the excess is of a temporary nature as evidenced by the fact that he was under the 100-hour standard for the prior 2 months and is expected to be under the standard during the next month;

except that such definition shall not include a father whose unemployment results from involvement in a labor dispute when the nature of that involvement is such that such father would, if otherwise eligible, be

disqualified for unemployment compensation under the State's unemployment compensation law.

* * * * * *

Title 45—Public Welfare

CHAPTER II—SOCIAL AND REHABILITATION SERVICE (ASSISTANCE PROGRAMS), DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE

PART 233—COVERAGE AND CONDITIONS OF ELIGIBILITY IN FINANCIAL ASSISTANCE PROGRAMS

Dependent Children of Unemployed Fathers

Notice of proposed regulations regarding the definition of unemployed father in the program of Aid to Families with Dependent Children was published in the FEDERAL REGISTER of January 3, 1973 (38 FR 49). The notice presented two alternatives relating to the inclusion of fathers who are on strike or otherwise disqualified for unemployment compensation:

A: Give States option as to including or excluding;

B: Establish hours of work as the sole criterion, thus precluding exclusion of strikers otherwise eligible.

Thousands of comments were received, coming from all States. As could be expected, most of the responses were from management and labor; there were also many from private citizens and a number from Congressmen.

It is apparent from these comments that no one solution is going to satisfy all those who wrote. There was a fully predictable, although relatively close, division.

After consideration of the conflicting views presented, the Department has adopted alternative "A", leaving the States free to determine whether or not those on strike qualify for AFDC-UF. This is the only course fully consistent with the "New Federalism" policies of this Administration. This permits States wide flexibility in the administration of Federal/State programs, so that they may determine the best course of action in the light of their individual situations and varying circumstances. A Federal mandate either to include or exclude

strikers would be undue interference with States' decisions on the extent of the program. If such a mandate is desired it should be set by Congress through the customary legislative process. Accordingly, alternative "A" is considered the acceptable alternative and is reflected in the amended regulation.

Section 233.100(a)(1), Chapter II, Title 45 of the Code of Federal Regulations is revised to read as follows.

§ 233.100. Dependent children of unemployed fathers.

(a) *Requirements for State plans.* * * *

(1) Include a definition of an unemployed father which shall apply only to families determined to be needy in accordance with the provisions in § 233.20 of this chapter. Such definition must include any father who:

(i) Is employed less than 100 hours a month; or

(ii) Exceeds that standard for a particular month, if his work is intermittent and the excess is of a temporary nature as evidenced by the fact that he was under the 100-hour standard for the prior 2 months and is expected to be under the standard during the next month; except that, at the option of the State, such definition need not include a father whose unemployment results from participation in a labor dispute or who is unemployed by reason of conduct or circumstances which result or would result in disqualification for unemployment compensation under the State's unemployment compensation law.

* * * * * *

(Sec. 1102, 49 Stat. 647 (42 U.S.C. 1302))

Effective date. The regulations in this section shall be effective on July 12, 1973.

Dated: July 6, 1973.

JAMES S. DWIGHT, JR.,
Administrator, Social and Rehabilitation Service.

Approved: July 9, 1973.

CASPAR W. WEINBERGER,
Secretary.

[FR Doc. 73-14304 Filed 7-11-73; 8:45 am]

* * * * * *

Statutory Appendix

PART A.—AID TO FAMILIES WITH DEPENDENT CHILDREN

* * * * * *

§ 601. Appropriations.

For the purpose of encouraging the care of dependent children in their own homes or in the homes of relatives by enabling each State to furnish financial assistance and rehabilitation and other services, as far as practicable under the conditions in such State, to needy dependent children and the parents or relatives with whom they are living to help maintain and strengthen family life and to help such parents or relatives to attain or retain capability for the maximum self-support and personal independence consistent with the maintenance of continuing parental care and protection, there is authorized to be appropriated for each fiscal year a sum sufficient to carry out the purposes of this part. The sums made available under this section shall be used for making payments to States which have submitted, and had approved by the Secretary, State plans for aid and services to needy families with children. * * *

§ 602 State plans for aid and services to needy families with children; contents; approval by Secretary.

* * * * * *

(F) that if and for so long as any child, relative, or individual (referred to the Secretary of Labor pursuant to subparagraph (A)(i) and (ii) and section 607(b)(2) of this title) has been found by the Secretary of Labor under section 633(g) of this title to have refused without good cause to participate under a work incentive program established by part C with respect to which the Secretary of Labor has determined his participation is consistent with the purposes of such part C, or to have refused without good cause to accept employment in which he is able to engage which is offered through the public employment offices of the State, or is otherwise offered by an employer if the offer of such employer is determined, after notification by him, to be a bona fide offer of employment—

* * * * * *

§ 607. Dependent children of unemployed fathers; definition.

(a) The term "dependent child" shall, notwithstanding section 606(a) of this title, include a needy child who meets the requirements of section 606(a)(2) of this title who has been deprived of parental support or care by reason of the unemployment (as determined in accordance with standards prescribed by the Secretary) of his father, and who is living with any of the relatives specified in section 606(a) (1) of this title in a place of residence maintained by one or more of such relatives as his (or their) own home.

(b) The provisions of subsection (a) of this section shall be applicable to a State if the State's plan approved under section 602 of this title.

(1) requires the payment of aid to families with dependent children with respect to a dependent child as defined in subsection (a) of this section when—

(A) such child's father has not been employed (as determined in accordance with standards prescribed by the Secretary) for at least 30 days prior to the receipt of such aid,

(B) such father has not without good cause, within such period (of not less than 30 days) as may be prescribed by the Secretary, refused a bona fide offer of employment or training for employment, and

(C)(i) such father has 6 or more quarters of work (as defined in subsection (d)(1) of this section) in any 13-calendar-quarter period ending one year prior to the application for such aid or (ii) he received unemployment compensation under an unemployment compensation law of a State or of the United States, or he was qualified (within the meaning of subsection (d)(3) of this section) for unemployment compensation under the unemployment compensation law of the State, within one year prior to the application for such aid; and

(2) provides—

(A) for such assurances as will satisfy the Secretary that fathers of dependent children as defined in subsection (a) of this section will be referred to the Secretary of Labor as provided in section 602(a)(19) of this title within thirty days after receipt of aid with respect to such children;

(B) for entering into cooperative arrangements with the State agency responsible for administering or supervising the administration of vocational education in the State, designed to assure maximum utilization of available public vocational education services and facilities in the State in order to encourage the retraining of individuals capable of being retrained; and

(C) for the denial of aid to families with dependent children to any child or relative specified in subsection (a) of this section—

(i) if, and for so long as, such child's father is not currently registered with the public employment offices in the State, and

(ii) with respect to any week for which such child's father receives unemployment compensation under an unemployment compensation law of a State or of the United States.

* * * * * *

§ 1302. Rules and regulations.

The Secretary of the Treasury, the Secretary of Labor, and the Secretary of Health, Education, and Welfare, respectively, shall make and publish such rules and regulations, not inconsistent with this chapter, as may be necessary to the efficient administration of the functions with which each is charged under this chapter. (Aug. 14, 1935, ch. 531, title XI, § 1102, 49 Stat. 647; 1946 Reorg. Plan No. 2, §§ 1, 4, eff. July 16, 1946, 11

F. R. 7873, 60 Stat. 1095; 1949 Reorg. Plan No. 11, § 1, eff. Aug. 20, 1949, 14 F.R. 5225, 63 Stat. 1065; 1950 Reorg. Plan No. 19, § 1, eff. May 24, 1950, 15 F.R. 3178, 64 Stat. 1271; Aug. 28, 1950, ch. 809, title IV, § 403(c), 64 Stat. 559; 1953 Reorg. Plan No. 1, §§ 5, 8, eff. Apr. 11, 1953, 18 F.R. 2053, 67 Stat. 631.)

* * * * * *

§ 354. Disqualifying conditions.

* * * * * *

(a-2) *Day of unemployment.*

* * * * * *

(iii) subject to the provisions of subsection (b) of this section, any day with respect to which the Board finds that his unemployment was due to a stoppage of work because of a strike in the establishment, premises, or enterprise at which he was last employed, and the Board finds that such strike was commenced in violation of the provisions of the Railway Labor Act or in violation of the established rules and practices of a bona fide labor organization of which he was a member.

(b) *Participation, interest, or financial assistance in labor dispute.*

The disqualification provided in subsection (a-2) (iii) of this section shall not apply if the Board finds that—

(i) the employee is not participating in or financing or directly interested in the strike which causes the stoppage of work: *Provided,* That payment of regular union dues shall not be construed to constitute financing a strike or direct interest in a strike within the meaning of this and the following paragraphs; and

(ii) he does not belong to a grade or class of workers of which, immediately before the commencement of the stoppage, there were members employed in the establishment, premises, or enterprise at which the stoppage occurs, * * *

* * * * * *

§ 141. Short title; Congressional declaration of purpose and policy.

(a) This chapter may be cited as the "Labor Management Relations Act, 1947".

(b) Industrial strife which interferes with the normal flow of commerce and with the full production of articles and commodities for commerce, can be avoided or substantially minimized if employers, employees, and labor organizations each recognize under law one another's legitimate rights in their relations with each other, and above all recognize under law that neither party has any right in its relations with any other to engage in acts or practices which jeopardize the public health, safety, or interest.

It is the purpose and policy of this chapter, in order to promote the full flow of commerce, to prescribe the legitimate rights of both employees and employers in their relations affecting commerce, to provide orderly and peaceful procedures for preventing the interference by either with the legitimate rights of the other, to protect the rights of individual employees in their relations with labor organizations whose activities affect commerce, to define and proscribe practices on the part of labor and management which affect commerce and are inimical to the general welfare, and to protect the rights of the public in connection with labor disputes affecting commerce. (June 23, 1947, ch. 120, § 1, 61 Stat. 136.)

* * * * * *

§ 151. Findings and declaration of policy.

The denial by some employers of the right of employees to organize and the refusal by some employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed

goods from or into the channels of commerce, or the prices of such materials or goods in commerce; or (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce.

The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

Experience has further demonstrated that certain practices by some labor organizations, their officers, and members have the intent or the necessary effect of burdening or obstructing commerce by preventing the free flow of goods in such commerce through strikes and other forms of industrial unrest or through concerted activities which impair the interest of the public in the free flow of such commerce. The elimination of such practices is a necessary condition to the assurance of the rights herein guaranteed.

It is declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective

bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection. (July 5, 1935, ch. 372, § 1, 49 Stat. 449; June 23, 1947, ch. 120, title I, § 101, 61 Stat. 136.)

* * * * * *

§ 152. Definitions.

* * * * * *

(3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless this subchapter explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, * * *

* * * * * *

(9) The term "labor dispute" includes any controversy concerning terms, tenure or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and employee.

* * * * * *

§ 2014. Eligibility Standards.

* * * * * *

(c) *Employment of able-bodied adults; excepted persons; refusal of work during strike or lockout; definition.*

Notwithstanding any other provisions of law, the Secretary shall include in the uniform national standards of eligibility to be prescribed under subsection (b) of this section a provision that each State agency shall

provide that a household shall not be eligible for assistance under this chapter if it includes an able-bodied adult person between the ages of eighteen and sixty-five (except mothers or other members of the household who have the responsibility of care of dependent children or of incapacitated adults, bona fide students in any accredited school or training program, or persons employed and working at least 30 hours per week) who either (a) fails to register for employment at a State or Federal employment office or, when impractical, at such other appropriate State or Federal office designated by the Secretary, or (b) has refused to accept employment or public work at not less than (i) the applicable State minimum wage, (ii) the applicable Federal minimum wage, (iii) the applicable wage established by a valid regulation of the Federal Government authorized by existing law to establish such regulations, or (iv) $1.30 per hour if there is no applicable wage as described in (i), (ii), or (iii) above. Refusal to work at a plant or site subject to a strike or a lockout for the duration of such strike or lockout shall not be deemed to be a refusal to accept employment. For the purposes of this section, the term "ablebodied adult person" shall not include any narcotics addict or alcoholic who regularly participates, as a resident or nonresident, in any drug addiction or alcoholic treatment and rehabilitation program.

* * * * * *

[redacted]

[redacted]

No. 75-1161

[redacted]

Petitioners,

v.

[redacted]

Respondents.

[redacted]

Petitioners,

v.

[redacted]

Respondents.

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APPENDIX

Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-1181

RICHARD A. BATTERTON, ET AL.,
Petitioners,

v.

ROBERT FRANCIS, ET AL.,
Respondents.

RICHARD A. BATTERTON, ET AL.,
Petitioners,

v.

BARRY BETHEA, ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

I. *Batterton v. Francis*

August 9, 1971—Plaintiffs Wilkens' and Francis' Complaint filed in United States District Court for the District of Maryland.

August 10, 1971—Application of Plaintiffs For Three-Judge Court.

August 10, 1971—Motion of Defendants In Opposition to Plaintiffs' Application For A Three-Judge Court.

August 18, 1971—Motion of Plaintiff Wilkens to Withdraw as Party Plaintiff.

August 18, 1971—Order Granting Plaintiff Wilkens leave to Withdraw As Party.

August 19, 1971—Notification And Request of District Judge for Constitution Of Three-Judge Court.

August 19, 1971—Order by Chief Judge of Fourth Circuit Court of Appeals Designating Members of Three-Judge Court.

August 23, 1971—Motion of United States Chamber of Commerce For Leave to Participate As Amicus Curiae.

August 23, 1971—Petition of Defendants For Request of Views of United States Department of Health, Education, and Welfare.

August 24, 1971—Motion of Plaintiffs for Summary Judgment.

August 25, 1971—Request of District Court that the United States Secretary of Health, Education and Welfare State His Views On Issues Involved.

August 25, 1971—Order that United States Chamber of Commerce May Participate As Amicus Curiae.

August 30, 1971—Motion of Edward Wright for Leave to Intervene As A Party Plaintiff.

August 30, 1971—Order Granting Edward Wright Leave to Intervene As Party Plaintiff.

August 30, 1971—Intervenor's Complaint.

September 7, 1971—Motion of Defendants Requesting Redefinition Of Class and Designation of Subclasses.

September 7, 1971—Motion of Defendants In Opposition to Plaintiffs' Motion for Summary Judgment and Defendants Cross Motion for Summary Judgment.

September 13, 1971—Opposition of Plaintiffs to Motion Requesting Redefinition of Class and Designation of Subclasses.

September 14, 1971—Memorandum Amicus Curiae of the Department of Health, Education and Welfare.

September 16, 1971—Hearing on Plaintiffs Motion for Summary Judgment.

January 28, 1972—Memorandum and Order of District Court Denying Injunction.

February 9, 1972—Motion of Plaintiffs For Immediate and Final Injunctive Relief.

February 23, 1972—Memorandum and Order Denying Motion for Immediate and Final Injunctive Relief and Changing Page of Opinion.

March 1, 1972—Motion of Plaintiffs To Reconsider Denial and Motion For Immediate and Final Injunctive Relief.

March 1, 1972—Defendants Opposition to Plaintiffs Motion To Reconsider Denial of Motion For Final Injunctive Relief.

March 1, 1972—Hearing on Plaintiffs' Motion to Reconsider Denial of Final Injunctive Relief.

March 6, 1972—Order of District Court Granting Plaintiffs Motion For Final Injunctive Relief and Enjoining Defendants as Requested.

March 8, 1972—Notice of Appeal of Defendants to Supreme Court of the United States.

March 30, 1972—Amended Notice of Appeal of Chamber of Commerce of the United States to The Supreme Court of the United States.

November 15, 1972—Order of Affirmance By the Supreme Court, dated October 16, 1972.

September 14, 1972—Defendants' Motion to Dissolve Injunction Previously Issued.

October 23, 1973—Plaintiffs Opposition to Motion To Dissolve Injunction.

October 24, 1973—Motion For Intervention on Behalf of the Chamber of Commerce of the United States of America.

November 1, 1973—Plaintiffs' Opposition to Motion of the Chamber of Commerce of the United States of America To Intervene.

December 10, 1973—Letter Opinion of District Court Granting Motion To Dissolve Injunction.

December 13, 1973—Motion of Plaintiffs for Reconsideration of Opinion of December 10, 1973.

December 28, 1973—Opposition of Defendants to Motion For Reconsideration.

January 3, 1974—Hearing on Motion To Dissolve Injunction and Motion to Reconsider Opinion of December 10, 1973.

January 8, 1974—Order Requesting Department of Health, Education, and Welfare to State Its Views.

January 31, 1974—Order Granting Motion to Intervene of the Chamber of Commerce of the United States of America.

April 26, 1974—Continued Hearing on Motion To Dissolve Injunction and Motion to Reconsider Opinion of December 10, 1973.

June 25, 1974—Opinion of Court Denying Defendants' Motion To Dissolve Injunction.

July 22, 1974—Notice of Appeal of Intervenor, Chamber of Commerce, to The Supreme Court.

July 22, 1974—Notice of Appeal of Intervenor, Chamber of Commerce, to The Court of Appeals.

July 25, 1974—Notice of Appeal of Defendants to The Supreme Court.

July 25, 1974—Notice of Appeal of Defendants to The Court of Appeals.

January 9, 1975—Entry of Order of Supreme Court, dated December 9, 1974, Dismissing Appeal of Defendants.

February 27, 1975—Entry of Order of Supreme Court Dismissing Appeal of Intervenor, Chamber of Commerce.

October 23, 1975—Order of Judgment of Court of Appeals, dated September 22, 1975, Affirming Opinion of District Court.

II. *Batterton v. Bethea*

August 29, 1973—Complaint of Plaintiff Barry Bethea Filed in the United States District Court for the District of Maryland.

August 29, 1973—Application of Plaintiff For Convening of Three-Judge Court.

October 26, 1973—Motion of Plaintiff For Certification As A Class Action.

November 12, 1973—Response of Defendant to Motion For Certification As A Class Action.

November 12, 1973—Motion of Defendant to Dismiss.

November 12, 1973—Opposition of Defendant to Application for Convening of Three-Judge Court.

November 16, 1973—Motion of Plaintiff For Summary Judgment.

October 4, 1974—Hearing on All Pending Motions.

November 27, 1974—Memorandum Opinion Denying Defendant's Motion to Dismiss and Granting Plaintiffs' Motion For Summary Judgment.

December 12, 1974—Judgment of Court Granting Plaintiffs' Motion for Class Certification and Ordering Defendants to Pay Benefits to Plaintiff and Others in His Class.

January 6, 1975—Notice of Appeal By Defendant to Court of Appeals.

October 17, 1975—Copy of Judgment of Court of Appeals, dated September 22, 1975, Affirming Judgment of District Court.

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

In the United States District Court
for the District of Maryland

Civil Action No. 71-853-K

Franklin Wilkens, individually and on behalf of his minor child Mary E. Wilkens, 1901 West North Avenue, Baltimore, Maryland 21217,

and

Robert Francis, individually and on behalf of his minor children, Robert J. Francis, Mary P. Francis, Elizabeth S. Francis, Michael J. Francis, James J. Francis, and Veronica H. Francis, 1428 Bonsal Street, Baltimore 21224,

Individually and on behalf of all other persons similarly situated,

Plaintiffs,

v.

Rita C. Davidson, Secretary, Department of Employment and Social Services, 1100 North Eutaw Street, Baltimore, Maryland 21201,

and

Raleigh C. Hobson, Director, Social Services Administration, 1315 St. Paul Street, Baltimore, Maryland 21202,

Individually and in their official capacities,

Defendants.

I. Introductory Statement

Plaintiffs, individually and on behalf of all others similarly situated, seek to have this Court declare invalid and enjoin enforcement of Rule 200-X (A) (2) of the Maryland Department of Employment and Social Services. This Rule denies to children who are otherwise "dependent" within the meaning of Section 407 of the Social Security Act — and therefore eligible for benefits — their statutory right to receive services and financial assistance pursuant to the Social Security Act when their fathers are disqualified from receiving unemployment benefits. Because the State Rule imposes a condition for eligibility beyond those enumerated in the Act, it must be held invalid. Furthermore, the Rule establishes a class of individuals who are denied benefits without any rational basis for such classification in violation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment.

II. Jurisdiction

The jurisdiction of this Court arises under sections 1343 (3) and (4) of Title 28 of the United States Code, which provides for the original jurisdiction of this Court in all suits authorized by section 1983 of Title 42 of the United States Code to redress the deprivation under color of state law of any right, privilege, or immunity secured by the Constitution of the United States or any Act of Congress providing for equal rights or civil rights of all persons within the jurisdiction of the United States.

Plaintiff's action for declaratory and injunctive relief is authorized by:

(a) Sections 2201 and 2202 of Title 28 of the United States Code and Federal Rule of Procedure 25, which relate to declaratory judgments' and

(b) Section 1983 of Title 42 of the United States Code which provides redress for the deprivation under color of law of rights, privileges and immunities secured to all citizens and persons within the jurisdiction of the United States by the Constitution thereof and by the Acts of Congress.

III. Three-Judge Court

This is a proper case for determination by a three-judge court pursuant to Sections 2281 and 2284 of Title 28 of the United States Code since the plaintiffs herein seek a permanent injunction of a rule or regulation of state-wide applicability made by an administrative body under the authority of a State statute on the ground that the regulation is contrary to the provisions of the limitation of the United States.

IV. Plaintiffs

1. Named plaintiff Franklin Wilkens resides at 1901 West North Avenue, Baltimore, Maryland and is a United States citizen. As set forth below, Mr. Wilkens has been found disqualified for benefits under the Maryland unemployment compensation program and accordingly, pursuant to State rule, is ineligible for benefits under the State's Aid to Families with Dependent Children of Unemployed Fathers (AFDC-E). Mr. Wilkens is the father of Mary Wilkens, a minor, and sues both individually and on her behalf.

2. Named plaintiff Robert Francis resides at 1428 Bonsal Street, Baltimore, Maryland, and is a United States citizen. As set forth below, Mr. Francis' union is presently on strike; he accordingly is disqualified from benefits under the Maryland unemployment compensation program. Because of this disqualification, Mr. Francis and his children are ineligible for the States AFDC-E benefits. Mr. Francis sues on his own behalf and on behalf of his minor children, Robert J. Francis, Mary P. Francis, Elizabeth S. Francis, Michael J. Francis, James J. Francis and Veronica H. Francis.

V. Defendants

1. Defendant Rita C. Davidson is the Secretary of the Maryland Department of Employment and Social Services.

2. Defendant Raleigh C. Hobson is Director of the Social Services Administration.

3. The above-named defendants are charged under the laws of the State of Maryland with enforcement, operation and execution of laws pertaining to public assistance grants, including Maryland Department of

Social Services Laws and Rule 200-X (a)(2), which is herein challenged as being in conflict with the Constitution of the United States and Social Security Act.

VI. Class Action

The named Plaintiffs bring this action on behalf of themselves and, pursuant to Federal Rules of Civil Procedure 23 (a) and (b) (2), on behalf of all other persons similarly situated. The members of this class are those needy and dependent children, who are otherwise eligible for benefits and services under section 407 of the Social Security Act (relating to Aid to Families with Dependent Children), but who are denied those benefits because their fathers are disqualified from receiving unemployment benefits from the Maryland Department of Employment and Social Services. This class is so numerous that joinder of all members is impossible and impracticable. The questions of law and fact are common to all members of the class. The claim of the named plaintiff is typical of the claims of all the members of the class. The named plaintiff will fairly and adequately protect the interests of the class. The Defendants have acted on grounds generally applicable to the class, thereby making appropriate final injunctive and declaratory relief with respect to the class as a whole.

VII. Factual Allegations

1. Plaintiff Robert Francis had been employed for approximately the last twenty years by American Smelting and Refining Company, Highland and Eastbourne Avenues, Baltimore, Maryland, as a laboratory technician.

2. On July 1, 1971, Mr. Francis' union struck his plant, and Mr. Francis has honored that strike.

3. As a result of the strike, Mr. Francis is presently unemployed and receiving no financial support.

4. Through his prior employment, Mr. Francis worked more than six quarters in any 13-calendar-quarter period ending within the last year.

5. Mr. Francis has not refused a bona fide offer of employment since his layoff.

6. Mr. Francis is now without any income to support his wife, who due to illness is unable to work, and his six children, aged six to thirteen. The Francis family is eating off food stamps and is unable to pay the numerous periodic bills which have become due in the past months. Mr. Francis receives no financial union strike benefits.

7. Mr. Francis, through union representatives, was informed of his disqualification from public assistance benefits for strikers as set forth in Section 6(e) of the Maryland State Unemployment Insurance Law.

8. Mr. Francis' application for AFDC-E benefits for his wife and six children was denied by the Baltimore City Department of Social Services on July 6, 1971. Under Rule 200-X(A)(2) of the Maryland Department of Employment and Social Services, AFDC-E benefits are not available to the families of fathers disqualified from receiving unemployment compensation.

9. Mr. Francis, his wife, and his children are suffering immediate and irreparable harm due to defendants' refusal to grant him AFDC-E benefits.

10. Plaintiff, Franklin Wilkens' employment as a porter and janitor was terminated on June 22, 1971, by the Baltimore Business Forms Company.

11. Through his prior employment, Mr. Wilkens worked more than six quarters in any 13-calendar-quarter period ending within the last year.

12. Mr. Wilkens has not refused a bona fide offer of employment since the termination of his job in June, 1971.

13. Mr. Wilkens' application to the Maryland Employment Security Administration for unemployment compensation was rejected on the ground that his termination was due to misconduct for excessive absenteeism pursuant to Section 6 of the Maryland State Unemployment Compensation Law. This denial was for a nine-week period ending August 28, 1971. That decision is presently being appealed.

14. Mr. Wilkens applied to the Baltimore City Department of Social Services for a grant for himself and his family, Mrs. Mary Jackson, with whom he

lives, their child, Mary Wilkens, and Mrs. Jackson's child, Eric Jackson. Mr. Wilkens was given an emergency grant of $196.00, but was denied continuing AFDC-E assistance.

15. The aforementioned Rule 200-X(A)(2) also acts to prevent Mr. Wilkens and his family from receiving AFDC-E benefits.

16. Mr. Wilkens and his family are presently receiving no source of income. In similar past situations they have borrowed from relatives. The family is living off of food stamps and is unable to meet its numerous monthly bills which have come due.

17. Mr. Wilkens and his family are suffering immediate and irreparable harm due to defendants' refusal to grant him AFDC-E benefits.

VIII. First Cause Of Action

For a first cause of action Plaintiffs allege:

1. Rule 200-X(A)(2) of the Maryland Department of Employment and Social Services prohibits the payment of funds under the program for assistance to children of unemployed fathers (AFDC-E) "to meet need due to being disqualified for unemployment insurance."

Section 407(b)(1)(c)(i) of the Social Security Act, 42 U.S.C. Section 607(b)(1)(c)(i), authorizes federal funding for an AFDC-E state program "if the State's plan . . . requires the payment of aid . . . when . . . [the] father has six or more quarters of work . . . in any 13-calendar-quarter ending within one year prior to the application for such aid. . . ."

3. The Department of Health, Education, and Welfare has implemented regulations which further state this requirement. 42 C.F.R. 233.100(a)(3)(iii) mandates that "the State plan must . . . provide for payment of aid with respect to any child when the conditions set forth in subdivisions (i), (ii), and (iii) of this subparagraph are met. . . ." Subparagraph (iii) reiterates the requirement of aid to those fathers who have engaged in "six or more quarters of work . . . within any 13-calendar-quarter period ending one year prior to the application for such aid. . . ."

4. The above-cited state Rule is in direct contradiction with the above-cited federal requirements because it excludes from benefits a portion of the children of fathers who have worked six or more quarters within a 13-quarter period ending one year prior to application, namely those whose fathers have been determined by the state to be disqualified for unemployment compensation.

5. The federal statute and regulation clearly prohibit the imposition of eligibility requirements other than those specified in the Act. The State Rule is therefore invalid because it defines eligibility in a manner inconsistent with federal requirements. In denying benefits in this fashion to plaintiffs and their class, defendants have breached their federally imposed obligation requiring "that aid to families with dependent children shall be furnished with reasonable promptness to all eligible individuals. . . ." 42 U.S.C. Section 302(a)(10).

IX. Second Cause Of Action

For a second cause of action plaintiffs allege:

1. By denying aid to children whose fathers are disqualified from receiving unemployment compensation, the state Rule establishes two categories of claimants: (1) those dependents of otherwise eligible fathers who are ineligible for unemployment compensation and (2) those dependents of otherwise eligible fathers who (a) are eligible for unemployment compensation but have exhausted their benefits, (b) are temporarily disabled, and (c) are underemployed as defined by HEW regulations.

2. No adequate State justification exists for this arbitrary classification scheme which acts to deny plaintiffs' class its statutory benefits. It is accordingly invalid under the equal protection clause of the Fourteenth Amendment to the Constitution of the United States.

X. Third Cause Of Action

For a third cause of action plaintiffs allege:

By denying aid to children whose fathers are disqualified from receiving unemployment compensation, defendants have established an arbitrary classification which denies entitlements owing to plaintiffs and their class without due process of law as required by the Fourteenth Amendment to the United States Constitution.

XI. Prayer For Relief

WHEREFORE, plaintiffs respectfully request, on behalf of themselves and all others similarly situated, that this Honorable Court:

1. Convene a three-judge district court pursuant to 28 U.S.C. Sections 2281 and 2284 to determine this controversy, and set this case down promptly for hearing.

2. Certify that this action is maintainable as a class action, pursuant to Fed. R. Civ. P. 23(c)(1).

3. Pending a hearing and determination by the three-judge court, grant a temporary restraining order pursuant to 28 U.S.C. Section 2284(3) restraining defendants, their successors in office, agents and employees, and all other persons in active concert and participation with them, from continuing to cause irreparable harm to plaintiffs and other persons similarly situated by refusing to grant them AFDC-E benefits in the amounts to which they are entitled and that otherwise would be available to them except for the fact that they disqualified from receiving unemployment compensation benefits.

4. Enter a final judgment pursuant to 28 U.S.C. Sections 2201 and 2202 declaring that Rule 200-X(A)(2) of the Maryland Department of Employment and Social Services is invalid on the grounds that it is violative of provisions contained in the Fourteenth Amendment to the Constitution of the United States and the Social Security Act.

5. Enter preliminary and permanent injunctions, pursuant to Fed. R. Civ. P. 65, enjoining defendants, their successors in office, agents and employees, and all other persons in active concert and participation with them from refusing to grant to plaintiffs and all persons similarly situated AFDC-E benefits in the amounts to which they are entitled on the grounds that

they are disqualified from receiving unemployment compensation.

6. Order the defendants, their successors in office, agents, and employees to notify promptly by first class mail at their last known address all persons who have been denied AFDC-E benefits to which they were entitled but for their disqualification from receiving unemployment compensation that they are now eligible for such benefits and to grant immediately such benefits to these persons.

7. Grant plaintiffs and all those similarly situated such additional or alternative relief as justice and equity so require, including payment of all monies wrongfully withheld.

Respectfully submitted,

C. Christopher Brown,
Curtis L. Decker,
H. Maxwell Hersch,
Legal Aid Bureau, Inc.
Law Reform Unit,
412 North Bond Street,
Baltimore, Maryland 21231,
Phone: 675-5990,
Attorneys for Plaintiffs.

MOTION FOR SUMMARY JUDGMENT

[Caption Omitted in Printing]

Plaintiffs, through counsel, move this court for an order granting summary judgment in favor of plaintiffs and in support thereof state: (1) that, as indicated by the attached statement, there is no geniune issue as to any material fact in this case and (2) that, as indicated by the attached memorandum, all questions of law must be decided in favor of plaintiffs.

WHEREFORE, plaintiffs pray that judgment be entered for plaintiffs and that this court:

1. Enter a final judgment pursuant to 28 U.S.C. §§ 2201 & 2202 declaring that Rule 200-X(A)(2) of the Maryland Department of Employment and Social Services is invalid on the ground that it is violative of

the provisions contained in the Fourteenth Amendment to the Constitution of the United States and the Social Security Act.

2. Enter preliminary and permanent injunctions, pursuant to Fed. R. Civ. P. 65, and enjoining defendants, their successors in office, agents and employees, and all other persons in active concert and participation with them from refusing to grant to plaintiffs and all persons similarly situated AFDC-E benefits in the amounts to which they are entitled on the grounds that they are disqualified from receiving unemployment compensation.

3. Order the defendants, their successors in office, agents, and employees to notify promptly by first class mail at their last known address all persons who have been denied AFDC-E benefits to which they were entitled but for their disqualification from receiving unemployment compensation that they are now eligible for such benefits and to grant immediately such benefits to these persons.

4. Grant plaintiffs and all those similarly situated such additional or alternative relief as justice and equity so require, including payment of all monies wrongfully withheld.

Respectfully submitted,

C. Christopher Brown,
Curtis L. Decker,
H. Maxwell Hersch,
Legal Aid Bureau, Inc.
Law Reform Unit,
412 North Bond Street,
Baltimore, Maryland 21231,
Phone: 675-5990,
Attorneys for Plaintiffs.

MOTION OF EDWARD WRIGHT FOR LEAVE TO INTERVENE AS PARTY PLAINTIFF

[Caption Omitted in Printing]

Edward Wright, through his attorneys, hereby seeks leave, pursuant to Fed. R. Civ. P. 24 (a)(2), to intervene

into the above-captioned suit as a party-plaintiff. In support of this motion, the applicant for intervention refers to the attached points and authorities and to his lodged complaint.

Respectfully submitted,

C. Christopher Brown,
Curtis L. Decker,
H. Maxwell Hersch,
Legal Aid Bureau, Inc.
Law Reform Unit,
412 North Bond Street,
Baltimore, Maryland 21231,
Telephone: 675-5990,
Attorneys for Plaintiffs.

INTERVENORS' COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

[Caption Omitted in Printing]

I. Jurisdiction

The jurisdiction of this Court arises under 28 U.S.C. §§ 1343 (3) and (4), which provides for the original jurisdiction of this Court in all suits authorized by 42 U.S.C. § 1983 to redress the deprivation under color of state law of any right, privilege, or immunity secured by the Constitution of the United States or any Act of Congress providing for equal or civil rights of all persons within the jurisdiction of the United States.

Plaintiff's action for declaratory and injunctive relief is authorized by:

(a)—28 U.S.C. §§ 2201 and 2202 and Federal Rule of Civil Procedure 57, which relate to declaratory judgments and

(b)—42 U.S.C. § 1983 which provides redress for the deprivation under color of law of rights, privileges and immunities secured to all citizens and persons within the jurisdiction of the United States by the Constitution thereof and by the Acts of Congress.

II. Intervenors

1. Edward Wright resides at 2874 Harford Road, Baltimore, Maryland, 21218 and is a citizen of the United States and the State of Maryland. As set forth below, Mr. Wright was discharged from his job; he accordingly is disqualified from benefits under the Maryland unemployment compensation program. Because of this disqualification Mr. Wright and his family are ineligible for the State's AFDC-E benefits. Mr. Wright sues on his own behalf and on behalf of his minor child, Edward Wright, Jr.

III. Defendants

1. Defendant, Rita C. Davidson, is the Secretary of the Maryland Department of Employment and Social Services.

2. Defendant, Raleigh C. Hobson, is Director of the Social Services Administration.

3. The above-named defendants are charged under the laws of the State of Maryland with enforcement, operation and execution of laws pertaining to public assistance grants, including Maryland Department of Social Services Laws and Rule 200-X(A)(2), which is herein challenged as being in conflict with the Constitution of the United States and Social Security Act.

IV. Class Action

The named Intervening Plaintiffs bring this action on behalf of themselves and, pursuant to Fed. R. Civ. P. 23(a) and (b)(2), on behalf of all other persons similarly situated. The members of this class are those needy and dependent children, who are otherwise eligible for benefits and services under section 407 and the Social Security Act (relating to Aid to Families with Dependent Children), but who are denied those benefits because their fathers are disqualified from receiving unemployment benefits from the Maryland Department of Employment and Social Services. This class is so numerous that joinder of all members is impossible and impracticable. The questions of law and fact are common to all members of the class. The claim of the named plaintiff is typical of the claims of all the members of the class. The named plaintiff will fairly

and adequately protect the interests of the class. The Defendants have acted on grounds generally applicable to the class, thereby making appropriate final injunctive and declaratory relief with respect to the class as a whole.

V. Factual Allegations

1. Until May 12, 1971, Edward Wright was employed by Wagoner Construction Company, 3639 Benson Avenue, Baltimore, Maryland, as a carpenter.

2. On May 12, 1971, Mr. Wright was discharged for excessive absenteeism, and is presently unemployed.

3. Through his prior employment Mr. Wright worked more than six quarters in any 13-calendar-quarter period ending within the last year.

4. Mr. Wright has not refused a bona fide offer of employment since he left work.

5. Mr. Wright is now without any income to support his wife, who due to illness is unable to work, and his son aged fifteen. Mr. Wright received one welfare check on July 6, 1971 and is unable to pay the numerous periodic bills which have become due in the past months.

6. Mr. Wright applied for unemployment benefits on July 7, 1971, and was disqualified due to excessive absenteeism until he becomes re-employed and earns at least ten times his weekly benefit amount ($630.00).

7. Mr. Wright received a public assistance grant for himself, his wife and child in July. When he applied in August he was refused due to his disqualification for unemployment.

8. Mr. Wright, his wife and child are suffering immediate and irreparable harm due to defendants' refusal to grant him AFDC-E benefits.

VI. First Cause Of Action

For a first cause of action the Intervening Plaintiffs allege:

1. Rule 200-X(A)(2) of the Maryland Department of Employment and Social Services prohibits the payment of funds under the program for assistance to children of

unemployed fathers (AFDC-E) "to meet need due to being disqualified for unemployment insurance."

2. Section 407(b)(1)(c)(i) of the Social Security Act, 42 U.S.C. Section 607(b)(1)(c)(i), authorizes federal funding for an AFDC-E state program "if the State's plan . . . requires the payment of aid . . . when . . . [the] father has six or more quarters of work . . . in any 13-calendar-quarter period ending within one year prior to the application for such aid . . ."

3. The Department of Health, Education, and Welfare has implemented regulations which further state this requirement. 42 C.F.R. 233.100(a)(3)(iii) mandates that "the State plan must . . . provide for payment for aid with respect to any child when the conditions set forth in subdivisions (i), (ii), and (iii) of this subparagraph are met. . . ."

4. The above-cited state Rule is in direct contradiction with the above-cited federal requirements because it excludes from benefits a portion of the children of fathers who have worked six or more quarters within a 13-quarter period ending one year prior to application, namely those whose fathers have been determined by the state to be disqualified for unemployment compensation.

5. The federal statute and regulation clearly prohibit the imposition of eligibility requirements other than those specified in the Act. The State Rule is therefore invalid because it defines eligibility in a manner inconsistent with federal requirements.

VII. Second Cause Of Action

For a second cause of action intervening plaintiffs allege:

1. By denying aid to children whose fathers are disqualified from receiving unemployment compensation, the state Rule establishes two categories of claimants: (1) those dependents of otherwise eligible fathers who are ineligible for unemployment compensation and (2) those dependents of otherwise eligible fathers who (a) are eligible for unemployment compensation but have exhausted their benefits, (b) are temporarily disabled, and (c) are underemployed as defined by HEW regulations.

2. No adequate State justification exists for this arbitrary classification scheme which acts to deny plaintiffs' class its statutory benefits. It is accordingly invalid under the equal protection clause of the Fourteenth Amendment to the Constitution of the United States.

VIII. Third Cause Of Action

For a third cause of action plaintiffs allege:

By denying aid to children whose fathers are disqualified from receiving unemployment compensation, defendants have established an arbitrary classification which denies entitlements owing to intervening plaintiffs and their class without due process of law as required by the Fourteenth Amendment to the United States Constitution.

IX. Prayer For Relief

WHEREFORE, intervening plaintiffs respectfully request, on behalf of themselves and all others similarly situated, that this Honorable Court:

1. Convene a three-judge district court pursuant to 28 U.S.C. Sections 2281 and 2284 to determine this controversy, and set this case down promptly for hearing.

2. Certify that this action is maintainable as a class action, pursuant to Fed. R. Civ. P. 23(c)(1).

3. Pending a hearing and determination by the three-judge court, grant a temporary restraining order pursuant to 28 U.S.C. Section 2284(3) restraining defendants, their successors in office, agents and employees, and all other persons in active concert and participation with them, from continuing to cause irreparable harm to plaintiffs and other persons similarly situated by refusing to grant them AFDC-E benefits in the amounts to which they are entitled and that otherwise would be available to them except for the fact that they disqualified from receiving unemployment compensation benefits.

4. Enter a final judgment pursuant to 28 U.S.C. Sections 2201 and 2202 declaring that Rule 200-X(A)(2) of the Maryland Department of Employment and Social Services is invalid on the grounds that it is violative of

provisions contained in the Fourteenth Amendment to the Constitution of the United States and the Social Security Act.

5. Enter preliminary and permanent injunctions, pursuant to Fed. R. Civ. P. 65, enjoining defendants, their successors in office, agents and employees, and all other persons in active concert and participation with them from refusing to grant to plaintiffs and all persons similarly situated AFDC-E benefits in the amounts to which they are entitled on the grounds that they are disqualified from receiving unemployment compensation.

6. Order the defendants, their successors in office, agents, and employees to notify promptly by first class mail at their last known address all persons who have been denied AFDC-E benefits to which they were entitled but for their disqualification from receiving unemployment compensation that they are now eligible for such benefits and to grant immediately such benefits to these persons.

7. Grant plaintiffs and all those similarly situated such additional or alternative relief as justice and equity so require, including payment of all monies wrongfully withheld.

Respectfully submitted,

C. Christopher Brown,
Curtis L. Decker,
H. Maxwell Hersch,
Legal Aid Bureau, Inc.
Law Reform Unit,
412 North Bond Street,
Baltimore, Maryland, 21231,
Phone: 675-5990,
Attorneys for Plaintiffs.

MOTION IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT, AND DEFENDANTS' CROSS MOTION FOR SUMMARY JUDGMENT

[CAPTION OMITTED IN PRINTING]

Defendants, by their counsel, move this Honorable Court for an Order denying plaintiffs' Motion For Summary Judgment in their favor, and that of their class as defined in accordance with defendants' Motion requesting redefinition of the same, and further move this Honorable Court, pursuant to Rule 56 (b) of the Federal Rules of Civil Procedure, for an Order granting summary judgment in favor of defendants.

In support of the foregoing, defendants aver (a) that there is no genuine issue as to any material fact in this case and (b) that, as shown by the attached Affidavits and Memorandum, all questions of law must be determined favorable to defendants.

WHEREFORE, defendants respectfully pray that judgment be entered for them, and that this Honorable Court:

1. Enter a final judgment pursuant to 28 U.S.C. §§ 2201 and 2202 declaring that Rule 200 X.A.2 of the Social Services Administration, Maryland Department of Employment and Social Services is valid and does not violate the Fourteenth Amendment to the Constitution of the United States or the Social Security Act;

2. Deny named and intervening plaintiffs' petitions for preliminary and permanent injunctions, pursuant to Fed. R. Civ. P. 65, both of which seek to enjoin defendants, their successors in office, agents and employees, and all other persons in active concert and participation with them, from refusing to grant to said plaintiffs, and all persons similarly situated, AFDC-E benefits on the grounds that they are disqualified from receiving unemployment compensation;

3. Deny plaintiffs' request to order the defendants, their successors in office, agents, and employees to notify all persons who have been denied AFDC-E benefits by reason of their disqualification from receiving unemployment compensation, and declare that such persons are not eligible for such benefits;

4. Deny to plaintiffs, and all those similarly situated, any other relief, including payment of monies withheld by reason of the application of the aforesaid Rule 200 X.A.2; and

5. Define the subclasses of plaintiffs in this action in accordance with defendants' Motion in respect to the same.

/s/ Francis B. Burch,
Attorney General,
/s/ Richard G. McCauley,
Assistant Attorney General,
/s/ Joel Rabin,
Assistant Attorney General,
/s/ Judson P. Garrett, Jr.,
Assistant Attorney General,
1400 One South Calvert Bldg.,
Baltimore, Maryland 21202,
383-3737,
Attorneys for Defendants.

MOTION FOR IMMEDIATE AND FINAL INJUNCTIVE RELIEF

[Caption Omitted in Printing]

Plaintiff Norman Lockhart, through his attorney, and on behalf of all those persons similarly situated, hereby moves the Court to grant immediate and final injunctive relief restraining defendants and their agents from refusing to grant plaintiff and his class Social Security (AFDC-E) benefits if they qualify for these benefits in all ways other than the fact that they are disqualified from receiving unemployment compensation. In support of this application, plaintiff refers to the attached affidavit and memorandum.

Respectfully submitted,

C. Christopher Brown,
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Legal Aid Bureau, Inc.,
412 North Bond Street,
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Telephone: 675-5990,
Attorney for Plaintiffs.

DEFENDANTS' MOTION TO DISSOLVE THE INJUNCTION PREVIOUSLY ISSUED

[Caption Omitted in Printing]

The Defendants respectfully move this Court, pursuant to Fed. R. Civ. P. 60(b), to dissolve the injunction previously issued herein, since it is no longer equitable that the injunction have prospective application. In support of this Motion, Defendants respectfully refer this Court to the facts and legal argument set forth in the Memorandum attached hereto and hereby made a part of this Motion.

Respectfully submitted,

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383-5614.

MOTION FOR INTERVENTION ON BEHALF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA

[Caption Omitted in Printing]

Pursuant to Rules 24(a) and (b) of the Federal Rules of Civil Procedure, the Chamber of Commerce of the United States of America hereby moves to intervene in this case for the limited purpose of assuring that all interests will be adequately represented, should an appeal be taken by one of the present parties. In support of this motion, the Chamber states:

1. This Court previously enjoined the State of Maryland from refusing to grant certain federal welfare

benefits to applicants who were unemployed due to their involvement in labor disputes. See *Francis v. Davidson*, 340 F. Supp. 351 (D.C. Md., 1972). The basis for the Court's decision was that the Maryland eligibility rule conflicted with federal regulations governing the program. Because the federal regulations have since been amended to remove this conflict, Defendants have recently moved this Court to dissolve the previously issued injunction referred to, *supra*. The Chamber supports, adopts, and incorporates by reference that motion.

2. While Chamber does not intend to inject issues, it does seek to intervene at this stage of the proceedings for the limited purpose of protecting the unique economic stake of its membership in the event that one of the parties appeals this Court's decision on the pending motion. This Court has already recognized the interests of the Chamber by permitting it the status of an *amicus curiae* with full participatory rights. The question remains, however, whether the Chamber will be able to defend those same interests should either the State or the Plaintiffs appeal.[1] The Supreme Court has recognized that in the area of labor relations administrative agencies, such as defendants herein, are inadequate to protect simultaneously both private and public interests of aggrieved persons, such as the Chamber's membership. *Int'l Union, etc., Local 283 v. Scofield*, 382 U.S. 205, 217 n.7 (1965). See also, e.g., *Hodgson v. United Mine Workers of America*, 473 F.2d 118, 125 (1972); *Wolpe v. Poretsky*, 144 F.2d 505 (D.C. Cir. 1944); *Zuber v. Allen*, 387 F.2d 862 (D.C., Cir. 1967); *Smuck v. Hobson*, 408 F.2d 175 (D.C. Cir. 1969). In the past other courts have often recognized the benefit, if not necessity, of the Chamber's participation in order to protect the interests of employers generally and to

[1] Any "fear that . . . intervention would lead to a flood of intervenors . . . is . . . unfounded." Schapiro, *Some Thoughts On Intervention Before Agencies and Arbitrators*, 81 Harv. L. Rev. 721, 747 (1968). Naturally once the employers' interest represented by the Chamber is, in this Court's view, adequately represented, no other person can claim a "right" to intervene (See Rule 24(a), F.R.C.P.; *Textile Workers v. Allendale* 226 F.2d at 768, n.10) or need be permitted to intervene. Rule 24(b), F.R.C.P.

insure a complete presentation of views which might not be presented by other parties. See, for example, *Grinnell Corp. v. Hackett, et al.*, 344 F. Supp. 749, rev'd 475 F.2d 449 (1st Cir. 1973); and *Russo v. Kirby*, 355 F. Supp. 122, *rev'd*, 453 F.2d 548 (2d Cir. 1971).

3. The stake of the Chamber's membership is clear. The Court's ruling on the pending motion to dissolve the injunction involved herein directly affects the relative collective bargaining strengths of management and unions. Accordingly, the result of this litigation will have a direct economic impact upon the Chamber's membership. See, *Dow Chemical Company and Chamber of Commerce v. Taylor*, — F. Supp. —, 81 LRRM 2872 (E.D. Mich. 1972), and *Textile Workers v. Allendale*, 226 F.2d 765 (D.C. Cir. 1955). The Chamber does not seek, however, to inject issues not now before the Court, but only to protect its membership's economic stake in these post-judgment proceedings, should an appeal be taken. See *Cascade Natural Gas Corp. v. El Paso Natural Gas Co.*, 386 U.S. 129 (1967) where the effect of economic competition was recognized as allowing intervention in post-judgment proceedings.

4. In light of the limited purpose of the Chamber's motion, i.e., to defend an appeal, no prejudice to the parties can result, and intervention should be permitted "as a matter of course." *Wolpe v. Poretsky*, 144 F.2d 505 (D.C. Cir. 1944). Indeed, alternatively an order conditioning the Chamber's intervention upon the filing of a notice of appeal by one of the other parties would be acceptable. Accordingly there could not exist any countervailing factors to preclude granting the instant motion.

WHEREFORE, The Chamber of Commerce of the United States of America respectfully urges that its motion for leave to intervene in this proceeding be granted.

Respectfully submitted,

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RICHARD B. BERMAN,
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Baltimore, Maryland 21202,
Attorneys for The Chamber of Commerce of the United States of America.

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

In The United States District Court
For the District of Maryland

Civil Action No. 73-874-H

Barry Bethea, individually and on behalf of his minor child, Barry Bethea, Jr., 3929 Edmondson Avenue, Baltimore, Maryland, Individually and on behalf of all persons similarly situated,

Plaintiffs,

v.

David T. Mason, Secretary Department of Employment and Social Services 1100 North Eutaw Street, Baltimore, Maryland 21201, Individually and in his official capacity,

Defendant.

Plaintiffs, individually and on behalf of their class, seek to have this court declare invalid and enjoin enforcement of Rule 200 X.A.2 of the Maryland Department of Employment and Social Services insofar as it denies Aid to Families with Dependent Children and an Employable Father (AFDC-E) to those families whose fathers have been denied unemployment compensation.

I. Jurisdiction

1. The jurisdiction of this court arises under 28 U.S.C. §§ 1343(3) and (4), which provide for its jurisdiction in all suits authorized by 42 U.S.C. § 1983 to redress the deprivation under color of state law of any right, privilege, or immunity secured by the Constitution of

the United States or any Act of Congress providing for equal rights or civil rights of all persons within the jurisdiction of the United States.

2. Plaintiffs' action for declaratory and injunctive relief is authorized by 28 U.S.C. §§ 2201 and 2202, concerning declaratory judgments, and 42 U.S.C. § 1983, which provides redress for the deprivation under color of law of rights privileges, and immunities secured to all citizens and persons within the jurisdiction of the United States by the United States Constitution and by Acts of Congress.

II. Plaintiffs

Barry Bethea currently resides with his family in Baltimore, Maryland. He and his child are United States citizens. As set forth below, Mr. Bethea has been declared by defendant to be ineligible for benefits under Maryland's Aid to Families with Dependent Children of Unemployed Fathers (AFDC-E) program because he had allegedly voluntarily quit his job without good cause. Mr. Bethea is the father of Barry Bethea, Jr., a minor, and sues both individually and on his child's behalf.

III. Defendant

1. Defendant David Mason is the Secretary of the Maryland Department of Employment and Social Services.

2. He is charged under the laws of the State of Maryland with enforcement, operation, and execution of laws pertaining to public assistance grants, including Maryland Department of Social Services Laws and Rule 200 X.A.2, which is herein challenged as being in conflict with the Constitution of the United States and the Social Security Act.

IV. Class Action

The named plaintiffs bring this action on behalf of themselves and, pursuant to Fed. R. Civ. P. 23(a) and (b) (2), on behalf of all other persons similarly situated. The members of this class are those needy and dependent children who are otherwise eligible for benefits and services under Section 407 of the Social

Security Act (relating to Aid to Families with Dependent Children), but who are denied those benefits because their fathers are not eligible to receive unemployment benefits from the Maryland Department of Employment and Social Services. This class is so numerous that joinder of all members is impossible and impracticable. The questions of law and fact are common to all members of the class. The claims of the named plaintiffs are typical of the claims of all the members of the class. The named plaintiffs will fairly and adequately protect the interests of the class. Defendants have acted on grounds generally applicable to the class, thereby making appropriate final injunctive and declaratory relief with respect to the class as a whole.

V. Three-Judge Court

This is a proper case for determination by a three-judge court pursuant to 28 U.S.C. §§ 2281 and 2284 since plaintiffs seek an injunction to restrain defendant, a state officer, from the enforcement, operation, and execution of a rule or regulation of state-wide applicability on the ground that it is contrary to the Constitution of the United States.

VI. Factual Allegations

1. Plaintiff, Barry Bethea, was last employed as a truck driver/deliveryman at Montebello Liquors in Baltimore, working four days a week and earning an average net weekly income of $76.00. On or about July 3, 1973, Mr. Bethea's employment with Montebello Liquors was terminated.

2. The incident which provoked Mr. Bethea's termination occurred after he noticed some liquor missing from his truck and failed to immediately report the missing liquor to the company, although he did report it immediately to the police. Because he had not reported it on the Saturday on which it was stolen and waited until the following Monday, primarily because the liquor store was closed until Monday, Mr. Bethea was told that he would have to pay for the stolen goods himself. Feeling that this was an unjust result, Mr. Bethea resigned his job.

3. Upon losing his job, Mr. Bethea applied to the Maryland Employment Security Administration for unemployment compensation.

4. On or about July 24, 1973, the Employment Security Administration rejected Mr. Bethea's application for unemployment insurance because it found him disqualified because he had allegedly "voluntarily quit his job without good cause." This is a ground for disqualification under Section 6 of the Maryland Unemployment Insurance Law, Article 95A Maryland Code Annotated. The ruling denied Mr. Bethea benefits for the week of June 29, 1973 and the following nine weeks.

5. Mr. Bethea then applied to the Department of Social Services for a public assistance AFDC-E grant.

6. Although he was given $167.00 as an emergency grant, he was ruled ineligible to receive continuing assistance, AFDC-E, because he had been denied unemployment compensation.

7. In denying Mr. Bethea AFDC-E benefits, defendant's agents acted in reliance on Maryland Department of Employment and Social Services Rule 200 X.A.2.

8. Mr. Bethea has been unsuccessfully trying to obtain employment since he left his last job in July. He has not turned down any bona fide offer of employment since that time.

9. Because the Betheas have no income, they have been forced to abandon their apartment. Because they could not pay the rent, they left their apartment under the threat of eviction. They are now forced to reside with Mr. Bethea's mother-in-law.

10. Because of their lack of income, the Betheas are forced to live off of the gratuities of Mr. Bethea's mother-in-law.

11. Unless the Betheas can become eligible for AFDC-E benefits, they will continue to suffer irreparable harm due to defendant's refusing to grant them these benefits.

12. Defendant and his agents have acted and continue to act pursuant to agency rule to deny AFDC-E benefits to all persons in Maryland who would

otherwise be eligible for AFDC-E benefits but for being denied unemployment insurance benefits due to voluntarily quitting their job.

VII. FIRST CLAIM

For a first claim plaintiffs allege:

1. Rule 200 X.A.2 of the Maryland Department of Employment and Social Services prohibits the payment of funds under the program for assistance to children of unemployed fathers (AFDC-E) to meet need due to being disqualified for unemployment insurance.

2. The application of this rule has been declared invalid by this court insofar as it affects those who have lost their jobs due to misconduct or a labor dispute. *Francis v. Davidson*, 340 F. Supp. 351 (D. Md. 1972), *aff'd* 409 U.S. 907 (1972). Defendant has interpreted *Francis*, however, to not nullify the rule insofar as it applies to those who have voluntarily quit their jobs.

3. Section 407(b)(1)(c)(i) of the Social Security Act, 42 U.S.C. §607(b)(1)(c)(i), authorizes federal funding for an AFDC-E state program "if the State's plan . . . requires the payment of aid . . . when . . . [the] father has six or more quarters of work . . . in any 13-calendar-quarter period ending within one year prior to the application for such aid. . . ."

4. The above-cited Maryland Rule is in direct contradiction with the above-cited federal requirements because it excludes from benefits a portion of the children of fathers who have worked six or more quarters within a 13-calendar-quarter period ending one year prior to application, namely those whose fathers have been determined by the state to be disqualified for unemployment conpensation due to a voluntary job loss.

5. The federal statute prohibits the imposition of eligibility requirements other than those specified in the Act. The state rule is therefore invalid because it defines eligibility in a manner inconsistent with federal requirements. In denying benefits in this fashion to plaintiffs and their class, defendant has breached his federally imposed obligation requiring "that aid to families with dependent children shall be furnished

with reasonable promptness to all eligible individuals. . . ." 42 U.S.C. §602(a)(10).

VIII. SECOND CLAIM

For a second claim plaintiffs allege:

1. By denying aid to children whose fathers are disqualified from receiving unemployment compensation due to voluntarily quitting their job, the state rule establishes two categories of claimants: (1) those dependents of otherwise eligible fathers who are ineligible for unemployment compensation solely for this reason and (2) those dependents of otherwise eligible fathers who (a) are eligible for unemployment compensation but have exhausted their benefits, (b) are temporarily disabled, (c) are underemployed as defined by HEW regulations, or (d) are ineligible for unemployment compensation because they are on strike or lost their job due to misconduct.

2. No adequate state justification exists for this arbitrary classification scheme which acts to deny plaintiffs' class its statutory benefits. It is accordingly invalid under the equal protection clause of the Fourteenth Amendment to the Constitution of the United States.

IX. PRAYER FOR RELIEF

WHEREFORE, plaintiffs respectfully request, on behalf of themselves and all others similarly situated, that this Honorable Court:

1. Certify that this action is maintainable as a class action, pursuant to Fed. R. Civ. P. 23(c)(1).

2. Order the convening of a three-judge court to hear this case.

3. Pending a hearing and determination by this court, grant preliminary relief restraining defendant, his successors in office, agents and employees, and all other persons in active concert and participation with him from continuing to cause irreparable harm to plaintiffs and other persons similarly situated by refusing to grant them AFDC-E benefits in the amounts to which they are entitled and that otherwise would be available to them except for the fact that they are not

eligible to receive unemployment compensation benefits.

4. Enter a final judgment pursuant to 28 U.S.C. §§ 2201 and 2202 declaring that Rule 200 X.A.2 of the Maryland Department of Employment and Social Services is invalid on the ground that it is violative of provisions contained in the Fourteenth Amendment of the Constitution of the United States and the Social Security Act.

5. Enter a permanent injunction, pursuant to Fed. R. Civ. P. 65, enjoining defendant, his successors in office, agents and employees, and all other persons in active concert and participation with them from refusing to grant to Plaintiffs and all persons similarly situated AFDC-E benefits in the amounts to which they are entitled on the grounds that they are disqualified from receiving unemployment compensation.

6. Order defendant, his successors in office, agents and employees to notify promptly by first class mail at their last known address all persons who have been denied AFDC-E benefits to which they were entitled but for their disqualification for such benefits and to grant immediately such benefits to these persons.

7. Grant plaintiffs and all those similarly situated such additional or alternative relief as justice and equity so require.

Respectfully submitted,

C. Christopher Brown,
Law Reform Unit
Legal Aid Bureau, Inc.,
341 North Calvert Street,
Baltimore, Maryland 21202,
Telephone: 685-1112,
Attorney for Plaintiffs.

MOTION TO DISMISS

[Caption Omitted in Printing]

The defendant moves the court in the alternative as follows:

1. To dismiss the action for want of jurisdiction on the ground that the complaint fails to raise a substantial constitutional question and, in the absence thereof, this Court does not have subject matter jurisdiction under either 28 U.S.C. 1343(3) or (4) to entertain a claim arising solely out of the Social Security Act.

2. To dismiss the action for want of jurisdiction and/or failure to state a claim upon which relief can be granted insofar as the complaint seeks monetary relief from the State of Maryland or the defendant as an officer thereof.

3. To dismiss the action insofar as it seek to hold David T. Mason individually liable on the ground that the complaint fails to state a claim upon which such relief can be granted.

Respectfully submitted,

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Attorney General of Maryland,
One Sourth Calvert Street,
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Joel J. Rabin,
Assistant Attorney General &
Counsel to the Department of
Employment & Social Services,
Judson P. Garrett, Jr.,
Theodore Losin,
Assistant Attorneys General,
1100 North Eutaw Street,
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383-3508,
Attorneys for Defendant.

MOTION FOR SUMMARY JUDGMENT

[Caption Omitted in Printing]

Plaintiffs, through counsel, move this court for an order granting summary judgment in their favor and in support thereof state: (1) there is no genuine issue as to any material fact in this case and (2) as indicated by the attached memorandum, all questions of law must be decided in plaintiffs' favor.

WHEREFORE, plaintiffs pray that judgment be entered for plaintiffs and that this court:

1. Enter a final judgment pursuant to 28 U.S.C. §§ 2201 & 2202 declaring that Rule 200-X(A)(2) of the Maryland Department of Employment and Social Services is invalid insofar as it denies AFDC-E benefits to the children of fathers who have been found ineligible for unemployment insurance benefits due to allegedly voluntarily leaving their prior employment on the ground that it is violative of the equal protection provisions contained in the Fourteenth Amendment to the Constitution of the United States and is violative of the Social Security Act.

2. Enter preliminary and permanent injunctions, pursuant to Fed. R. Civ. P. 65, enjoining defendant, his successors in office, agents and employees, and all other persons in active concert and participation with him from refusing to grant to plaintiffs and all persons similarly situated AFDC-E benefits in the amounts to which they are entitled on the grounds that they are disqualified from receiving unemployment compensation due to voluntarily leaving a prior job.

3. Order the defendant, his successors in office, agents, and employees to notify promptly by first class mail at their last known address all persons who have been denied AFDC-E benefits to which they were entitled but for their disqualification from receiving unemployment compensation that they are now eligible for such benefits and to grant immediately such benefits to these persons.

4. Grant plaintiffs and all those similarly situated such additional or alternative relief as justice and

equity so require, including payment of all monies wrongfully withheld.

Respectfully submitted,

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685-1112,
Attorney for Plaintiffs.

RELEVANT PORTIONS OF LEGISLATIVE HISTORY OF SECTION 407(a), AS AMENDED

1. Committee Print, Summary of Provisions of H.R. 12080, The "Social Security Amendments of 1967," House Comm. on Ways and Means, pp. 12-13:

> Under present law, the States can establish programs for families with dependent children based on the unemployment of a parent and receive Federal matching. The definition of unemployment is left up to the individual States. Under the bill, Federal matching would be available only for the children of unemployed fathers and the definition of unemployment would be made by the Federal Government.

2. S. Rep. No. 744, 90th Cong., 1st Sess., Comm. on Finance, Social Security Amendments of 1967, pp. 4 and 160:

> the bill would . . . (c) modify the optional unemployed fathers program to provide for a uniform definition of employment throughout the United States. (*Id.* at 4)
>
> . . .
>
> A major characteristic of the existing law is the authority left to the States to define "unemployment." The committee believes that this has worked to the detriment of the program because of the wide variation in the definitions used by the States. In some instances, the definitions have been very narrow so that only a few people have

been helped. In other States, the definitions have been relatively broad. The committee bill is designed to correct this situation and to make other improvements in the program.

The amendments proposed by the committee would authorize a Federal definition of unemployment by the Secretary and would tie the program to the work incentive program established by the bill. (*Id.* at 160)

3. Explanation of the Conference Committee Report on the Social Security Amendments of 1967 by Rep. Mills, Cong. Rec. H16863, Vol. 113, Part 27, pp. 3673, 3674 (Dec. 13, 1967):

The amendments provide that under State programs of aid to families with dependent children of unemployed parents, Federal matching would be available only for the children of unemployed fathers. Under present law States may include children on the basis of the unemployment of mothers, as well as fathers. The amendments also provide that the Secretary will prescribe standards for the determination of what constitutes unemployment. The term is defined by the States under present law.

4. Committee Print, Brief Summary of Major Provisions and Detailed Comparison with Prior Law, The Social Security Amendments of 1967 — Public Law 248, 90th Congress, U.S. Senate Comm. on Finance, pp. 3 and 63 (July 25, 1968):

The amendments provide for a Federal definition of unemployment for States which have AFDC-UF programs. (*Id.* at 3)

. . .

Limits the program to children who need support or care on the basis of the unemployment of the father. Unemployment will be defined by the Secretary of Health, Education, and Welfare. (*Id.* at 63)

5. Joint Committee Print, Summary of Social Security Amendments of 1967, U.S. Senate Comm. on Finance and House Comm. on Ways and Means, p. 17 (Dec. 1967):

The amendments provide that under State programs of aid to families with dependent children of unemployed parents, Federal matching would be available only for the children of unemployed fathers. Under present law States may include children on the basis of the unemployment of mothers, as well as fathers. The amendments also provide that the Secretary will prescribe standards for the determination of what constitutes unemployment. The term is defined by the States under present law.

6. Statement by Wilbur J. Cohen, Under Secretary of HEW before U.S. Sen. Comm. on Finance, Hearing on Social Social Amendments of 1967, Part I, page 268, August 23, 1967 (App. 39), p. 8:

The 1961 Social Security Amendments for the first time permitted assistance payments to children who were needy because their father was unemployed. Today, 22 States have programs to assist such children. But the differences between State programs are great. States may define unemployment as narrowly or broadly as they wish, requiring substantial previous work experience or no work experience. This variation in definition of unemployment is shown clearly by three adjacent southwestern States, Arizona, Utah, and Colorado. Each of these States has a population of between 1 and 2 million, yet in Arizona only 19 families of unemployed parents received AFDC in May, while during the same month there were 880 in Utah and 1,600 in Colorado. Arizona's narrow definition of unemployment has kept its program to a token level.

The House bill continues to allow States to choose whether they will include dependent children of unemployed parents under AFDC. But for the first time the House bill would set a Federal definition of unemployment. We are in complete agreement that there should be a Federal definition of unemployment.

7. H. Rep. No. 544, 90th Cong., 1st Sess., Comm. on Ways and Means, pp. 17, 108, and 175:

> Under present law, the States can establish programs for families with dependent children based on the unemployment of a parent and receive Federal matching. The definition of unemployment is left up to the individual States. Under the bill, Federal matching would be available only for the children of unemployed fathers and the definition of unemployment would be made by the Federal Government. (*Id.* at 17)
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> . . .
>
> A major characteristic of the law is the authority left to the States to define "unemployment." Your committee believes that this has worked to the detriment of the program because of the wide variation in the definitions used by the States. In some instances, the definitions have been very narrow so that only a few people have been helped. In other States, the definitions have gone beyond anything that the Congress originally envisioned. Your committee's bill is designed to correct this situation and to make other improvements in the program.
>
> The overall objective of the amendments proposed by the committee is to authorize a Federal definition of unemployment by the Secretary (but within certain limits set forth in the legislation). . . . (*Id.* at 108)
>
> . . .
>
> The new section 407(a) of the act redefines a "dependent child" for purposes of such section 407 as one whose deprivation results from the unemployment (as determined in accordance with standards prescribed by the Secretary) of his father and who meets the other eligibility conditions. (*Id.* at 175)

Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

NO. 75-1181

RICHARD BATTERTON, ET AL.,

Petitioners,

v.

ROBERT FRANCIS, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

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April 7, 1976

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

NO. 75-1181

RICHARD A. BATTERTON, ET AL.,

Petitioners,

v.

ROBERT FRANCIS, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

Respondent, Robert Francis, respectfully opposes petitioner Richard A. Batterton's petition for a writ of certiorari to review the per curiam opinion and judgment of the United States Court of Appeals for the Fourth Circuit.

QUESTIONS PRESENTED

Is a substantial question of federal law presented in this case?

Does 45 C.F.R. §233.100(a)(1)(ii), as amended, which gives the states broad discretion in determining eligibility for welfare benefits for the children of unemployed fathers, conflict with the requirements of 42 U.S.C. §607(a)?

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STATEMENT OF THE CASE

To avoid unnecessary repetition, respondents accept petitioners' Statement of the Case.

ARGUMENT

I.

The decisions below have an extremely minimal impact on the administration of state welfare programs.

The courts below held that the regulation promulgated by the Secretary of Health, Education, and Welfare in July 1973, 45 C.F.R. §233.100 (a)(1), was in conflict with the Social Security Act and was thus invalid. While the effect of this holding was to nullify the Maryland regulation, MARR 7.02.09 Sec. 10.A(2) (formerly Rule 200 X.A.2), which excludes from AFDC-UF coverage those children of fathers who are on strike or who are otherwise disqualified from unemployment insurance, the impact of the decisions outside Maryland is insubstantial. According to the information supplied by H.E.W. to the district court, only 23 states, including Maryland, participate in the optional AFDC-UF program. Of this number, five states impose eligibility conditions on strikers, and Maryland is the only state which disqualifies unemployed fathers who are ineligible for unemployment insurance. See Francis v. Davidson, 340 F.Supp. 351, 363 n.22 (D.Md. 1972) (hereinafter cited as Francis I) (App. 19a). The invalidation of the H.E.W. regulation therefore has no substantial effect outside the State of Maryland.

II.

There is no conflict of decisions among the circuits.

Petitioners have cited no cases from other circuits which conflict with the decisions in the courts below. Indeed, given the limited number of jurisdictions which impose eligibility criteria similar to those of Maryland's AFDC-UF program, it is not surprising that no other courts have dealt with the narrow question raised in this case. The decisions below thus constitute an

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uncontradicted body of law which does not invite this Court's resolution or review.

III.

In summarily affirming the decision in Francis I, this Court has recognized the insubstantiality of the question presented in this litigation.

In Francis I, the district court enjoined the Maryland AFDC-UF regulation as violative of the federal regulation as written prior to 1973 (App. 54a). Maryland appealed that decision to this Court, which summarily affirmed, 409 U.S. 904 (1972) (App. 61a). While the subsequent litigation involves the validity of the amended H.E.W. regulation in light of the requirements of the federal statute, 42 U.S.C. §607(a), Bethea v. Mason, 384 F.Supp. 1274 (D. Md. 1974) (hereinafter cited as Bethea) (App. 86a), and Francis II (App. 79a), aff'd ___ F.2d ___ (4th Cir. Sept. 22, 1975) (App. 100a), in substance the importance of the federal question has remained the same throughout the history of this case. That question relates to the ability of the states to exclude from AFDC-UF coverage those children of fathers who are out of work due to labor disputes or who are otherwise disqualified from receiving unemployment. In affirming the Francis I decision without opinion, this Court tacitly agreed that the issue did not warrant plenary review. Nothing further has developed in the four years since that decision which would raise the question to the level of importance which would justify granting the writ.

IV.

Since the Secretary of H.E.W. has proposed a new regulation to conform to the holding of Francis II, review by this Court is not warranted at this time.

On August 8, 1975, H.E.W. proposed amendments to 45 C.F.R. §233.100(a)(1), the regulation which was invalidated by the Francis II decision. See 40 Fed. Reg. 33461 (App. 121a). This proposal eliminates any language which would allow the states the option of excluding fathers out of work due to circumstances which would disqualify them from unemployment insurance but requires the exclusion of strikers who would be, or who are disqualified from

unemployment compensation under state law. If adopted, this amendment dramatically alters the posture of this case. As petitioners admit, the regulation would allow AFDC-UF payments to two classes of respondents: those fathers who are unemployed by virtue of misconduct and those who have voluntarily quit their jobs (Petition at p. 15). In addition, the regulation constitutes a significant change with regard to strikers, who, under the proposed amendment, are mandatorily excluded from AFDC-UF coverage, where they were formerly excluded at the option of the states. See 45 C.F.R. §233.100(a)(1). In view of the possible administrative adoption of this new regulation, this Court should decline to accept review to await the decision of the Secretary. Compare Richardson v. Wright, 405 U.S. 208 (1972). Indeed, prior to this Court's refusal to grant plenary review to Francis I, H.E.W. was similarly in the process of adopting a regulation, amending 45 C.F.R. §233.100(a)(1) as then written. In view of the pending revision, the Solicitor General recommended that this Court deny review at that time. See Memorandum for the United States as Amicus Curiae, Davidson v. Francis and Chamber of Commerce of the United States v. Francis, August 1972 (App. 56a).

V.

The Decisions Below are Clearly Correct

A. Since the regulation allows the states to exclude from AFDC-UF coverage fathers who are clearly unemployed, it conflicts with the requirements of 42 U.S.C. §607(a).

Section 407(a) of the Social Security Act, 42 U.S.C. §607(a), requires that states provide AFDC-UF benefits to "a needy child . . . who has been deprived of parental support or care by reason of the unemployment (as determined in accordance with standards prescribed by the Secretary) of his father." The federal regulation at issue here, however, 45 C.F.R. §233.100(a)(1), excludes two classes of respondents who are clearly unemployed, namely those out of work by virture of their alleged gross misconduct, voluntarily quitting their jobs, or due to a labor-dispute work stoppage. The district

courts, in both Francis II and Bethea, correctly held that the Secretary's regulation, in excluding these fathers who are unemployed, conflicted with the plain meaning of 42 U.S.C. §607(a) and was thus invalid.

In Francis I, the district court held invalid the Maryland regulation which conflicted with the H.E.W. regulation, 45 C.F.R. §233.100(a)(1), as then written. The Court said:

> A man out of work because he was discharged for cause by his employer is unemployed. There can be no two ways about that conclusion.

340 F.Supp. at 366 (emphasis in original) (App. 24a). In Francis II, the court applied this simple logic in the context of the federal statute:

> The statute relates to the unemployment of a father--and a father who is discharged for cause by his employer is unemployed.

379 F.Supp. at 81 (emphasis in original) (App. 83a). Similarly, in Bethea, the district court found that "a father who voluntarily quits his job is unemployed within the meaning of 42 U.S.C. §607(a)." 384 F.Supp. at 1281 (App. 96a). It requires no strained statutory interpretation to reach the obvious conclusion that fathers who have either been discharged for cause or who have quit their jobs are not employed. In so holding, the district courts correctly found the Secretary's regulation contrary to the clear command of the Social Security Act. Thus, the Maryland Rule, 200X.A.2. (now MARR 7.02.09 Sec. 10.A.(2)) remains invalid.

B. Because the regulation fails to establish a uniform, federal definition of unemployment, it conflicts with the requirements of 42 U.S.C. §607(a).

While finding that "a person out of work because of a labor dispute does not necessarily fall within the definition of 'unemployed,'" 379 F.Supp. at 81 (App. 83a), the district court in Francis II held that the federal regulation, in failing to prescribe a national definition of "unemployment," conflicted with the intent of the 1968 amendments to the Social Security Act. Thus, with regard to the third class of respondents, namely strikers, the regulation was held invalid.

Under the original 1961 Enactment, Pub. L. 87-31, §407, 75 Stat. 75

(1961), each state which elected to participate in the optional AFDC-UF program was given the freedom to define who was an "unemployed parent." In 1968, Congress amended the statute to achieve uniformity among the varied definitions applied by the states. See H. R. Rep. No. 544, 90th Cong., 1st Sess. 108 (1967), quoted in Francis I, 340 F.Supp. at 377 (App. 46a). Under the amendment, "the definition of unemployment would be made by the Federal Government." H. R. Rep. No. 544, 90th Cong., 1st Sess. at 17 (1967), quoted in Francis II, 379 F.Supp. at 82 (App. 85a). That definition was to be "uniform . . . throughout the United States." Report of U.S. Senate Comm. on Finance, Social Security Amendments of 1967 at 4 (Nov. 14, 1967).

The clear import of the legislative history is that Congress desired a uniform set of federal standards within which the states could implement their AFDC-UF programs. The regulation at issue here, as the district court correctly found, "contains no standards whatsoever." 379 F.Supp. at 82 (App. 85a). Instead, the states are given multiple options as to who they may include or exclude within their definitions of unemployed fathers: strikers, those who are disqualified from state unemployment compensation, and those who could be disqualified from unemployment compensation. The differences in unemployment eligibility among the states only increases the likelihood of variability among AFDC-UF programs. This result is directly contrary to the statutory mandate. By issuing a regulation which delegates to the states the broad discretion of defining "unemployment," the Secretary has severely undermined the intent and spirit of the 1968 amendments.

CONCLUSION

Because this case presents no substantial issue, the petition should be denied.

Respectfully submitted,

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Nos. 75-1181 and 75-1182

In the Supreme Court of the United States

OCTOBER TERM, 1976

RICHARD A. BATTERTON, ET AL., PETITIONERS

v.

ROBERT FRANCIS, ET AL.

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, PETITIONER

v.

ROBERT FRANCIS, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

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CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, PETITIONER

v.

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ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

This submission is made in response to the Court's invitation to the Solicitor General to express the views of the United States.

QUESTION PRESENTED

The United States will discuss the following question: Whether a regulation promulgated by the Secretary of Health, Education, and Welfare that allows but does not

require state programs of aid to dependent children of unemployed fathers to exclude from the definition of "unemployment" an absence from work that derives from "conduct or circumstances which result or would result in disqualification for unemployment compensation under the State's unemployment compensation law" or from "participation in a labor dispute" is consistent with Section 407 of the Social Security Act, which defines "dependent child" to include a needy child "who has been deprived of parental support or care by reason of the unemployment (as determined in accordance with standards prescribed by the Secretary) of his father * * *."[1]

STATEMENT

1. Title IV of the Social Security Act, 49 Stat. 627, as amended, 42 U.S.C. 601 *et seq.*, creates a cooperative federal-state program for aid to families with dependent children (AFDC). From the program's inception in 1935 until 1961, only those families with dependent children deprived of parental support or care on account of the death, continued absence, or physical or mental incapacity of a parent were eligible for AFDC assistance. See Section 406 of the Act, as amended, 42 U.S.C. 606. In 1961, however, Congress amended the Act to permit states, at their option, to assist families with dependent children who were deprived of parental support by reason of the unemployment of a parent (AFDC-E or AFDC-UF). Section 407 of the Act, as amended, 42 U.S.C. 607; see 75 Stat. 75.[2]

---

[1]We do not discuss the further question whether, if that regulation is held invalid, individuals who have voluntarily left their employment without good cause, have been discharged for gross misconduct, or are out of work due to a work stoppage resulting from a labor dispute, are "unemployed" within the meaning of the Act. In our view, if the present regulation is invalid, it should be left to the Secretary to make those determinations in the first instance.

[2]The statute was later amended to refer to dependent children of unemployed "fathers" rather than of unemployed "parents." 81 Stat. 882.

As originally enacted, Section 407 authorized each participating state to define "unemployment." 75 Stat. 75. In 1968, however, Congress amended Section 407 to provide (1) that "dependent child" included "a needy child * * * who has been deprived of parental support * * * by reason of the unemployment (as determined in accordance with standards prescribed by the Secretary) of his father * * *" and (2) that, in order to qualify for federal assistance, a state plan must provide aid when, with limitations not relevant here, "such child's father has not been employed (as determined in accordance with standards prescribed by the Secretary) for at least 30 days * * *." 42 U.S.C. 607(a) and (b); see 81 Stat. 882. Pursuant to that statute, the Secretary prescribed a uniform hours-worked standard of "unemployment." 34 Fed. Reg. 1146; see Jt. App. 37a.[3]

Maryland Social Services Administration Rule 200.X.A.2 denies assistance under the AFDC-UF program when the father is out of work by reason of conduct or circumstances that would render him ineligible for state unemployment insurance benefits. Under Maryland law (Ann. Code of Maryland, Art. 95A, §6 (1969 repl.)), unemployment benefits are not paid to, *inter alia*, (1) persons discharged from employment due to "gross misconduct," (2) persons out of work "due to a stoppage of work * * * which exists because of a labor dispute," and (3) persons "leaving work voluntarily without good cause" (Jt. App. 7a, 87a, 89a). Thus, in Maryland, otherwise eligible families with dependent children whose fathers fall within one of those three categories are denied AFDC-UF payments.[4]

---

[3]"Jt. App." refers to the joint appendix to the petitions for a writ of certiorari.

[4]The Secretary approved the Maryland AFDC-UF plan. See Section 402 of the Act, as amended, 42 U.S.C. (and Supp. V) 602.

2. This action was brought by fathers whose families had been denied AFDC-UF benefits because they were ineligible for state unemployment compensation—some had been discharged because of gross misconduct and others were out of work due to a labor stoppage resulting from a labor dispute. The plaintiffs filed a class action in the United States District Court for the District of Maryland, alleging that the state regulation violated the Constitution, the Act, and the Secretary's regulation prescribing a uniform hours-worked standard. A three-judge court rejected the plaintiffs' constitutional arguments but held the state regulation invalid under the Secretary's regulation (*Francis* v. *Davidson*, 340 F. Supp. 351 (*Francis I*); Jt. App. 21a, 24a, 28a-29a).[5]

The court enjoined the application of the Maryland regulation (Jt. App. 54a-55a), and the case was appealed to this Court (No. 71-1447). The Solicitor General, at the Court's invitation, filed a memorandum for the United States as *amicus curiae*; the memorandum took the position that summary affirmance would be appropriate in view of the fact that the Secretary was in the process of amending the regulation to clarify that the states are entitled to vary the coverage of their programs on the basis of factors other than the number of hours worked (Jt. App. 56a-60a). The Court summarily affirmed the judgment of the district court. 409 U.S. 904.

3. The Secretary then promulgated an amended regulation, 45 C.F.R. 233.100(a)(1) (Jt. App. 125a), that retained the hours-worked standard as a minimum test

[5]The United States Chamber of Commerce's motion to intervene as a party under Rule 24(a), Fed. R. Civ. P., was denied by the district court, but the Chamber was permitted to file a brief and to participate in oral argument as *amicus curiae* (Jt. App. 4a, n. 7). The Chamber's appeal to this Court from the denial of its motion was dismissed, 409 U.S. 907, as was the Chamber's appeal to the Fourth Circuit (Jt. App. 107a-113a).

that applicants in all states were required to meet in order to be eligible for benefits as "unemployed fathers," but added that "at the option of the State, [the] definition [of "unemployed father"] need not include a father whose unemployment results from participation in a labor dispute or who is unemployed by reason of conduct or circumstances which result or would result in disqualification for unemployment compensation under the State's unemployment compensation law."

On the basis of the Secretary's amended regulation, the state defendants requested the district court to dissolve the injunction entered in *Francis I*. The Chamber of Commerce of the United States was permitted to intervene (Jt. App. 61a-1 to 61a-2), and the court requested and received the views of the Secretary as *amicus curiae* (Jt. App. 61a-2 to 78a, 82a).

The district court refused to dissolve its prior injunction (*Francis* v. *Davidson*, 379 F. Supp. 78 (*Francis II*); Jt. App. 79a-85a). With respect to the class of fathers discharged for misconduct, the court held (Jt. App. 83a; emphasis in original) that the federal and state regulations were both invalid because "a father who is discharged for cause by his employer *is* unemployed * * * [and] [u]ntil the Congress amends the statute, no combination of federal and state regulations may provide [otherwise]." With respect to the class of fathers out of work because of a labor dispute, the court agreed that such individuals did not necessarily fall within the definition of "unemployed," but held (Jt. App. 85a) the Secretary's amended regulation invalid because it "contains no standards" as required by the 1968 amendment to the Act. The court concluded that "the Maryland * * * regulation excluding those unemployed because of labor disputes remains invalid" (Jt. App. 85a).

4. In a separate action filed after the decision in *Francis I*, the same Maryland regulation was challenged

by fathers not eligible for unemployment compensation under Maryland law because they had voluntarily left their jobs without good cause. The district court, following the reasoning in *Francis II* with respect to fathers discharged for misconduct, held that a father who voluntarily quits his jot is "unemployed" within the meaning of the Act and that the state regulation therefore is invalid as applied (*Bethea* v. *Mason*, 384 F. Supp. 1274; Jt. App. 86a-98a).

5. The court of appeals consolidated the appeals from the district courts' decisions in *Francis II* and *Bethea* and affirmed *per curiam* (Jt. App. 100a-104a).

DISCUSSION

1. The central question in this case is whether the Secretary has authority to permit the states, if they so choose, to deny AFDC-UF benefits on the ground that the father's absence from work derives from "conduct or circumstances which result or would result in disqualification for unemployment compensation under the State's unemployment compensation law." 45 C.F.R. 233.100 (a)(1). All respondents were denied AFDC-UF benefits on that ground. See p. 3, *supra*.

The courts below did not explicitly address that question. Instead, they inquired directly into whether the members of each class of respondents (except strikers; see p. 9, *infra*) were in fact "unemployed" within the meaning of Section 407 of the Social Security Act. This approach reveals a misunderstanding of the allocation of responsibility for defining "unemployed" or "unemployment" under the Act. Congress did not itself prescribe a definition of "unemployment." To the contrary, under the statutory scheme it is for the Secretary and, derivatively, for the states to give substantive content to that term in the first instance. The role of the courts is

to determine whether the Secretary's regulation is reasonable and therefore valid under the Act, not whether particular individuals or groups of individuals are in some abstract sense "unemployed." If the Secretary's regulation is found to be unreasonable, the primary responsibility for evolving suitable standards for determining unemployment should be left to him and should not be assumed by the courts. See note 1, *supra*.

The Secretary's regulation, however, is reasonable. "Unemployment," as used in the Act, is not self-defining. Congress originally provided that the term be "defined by the State[s]." 75 Stat. 75. Under that provision, the states were free to adopt definitions that met their individual priorities and perceptions of need. In 1968, Congress narrowed the states' authority to define "unemployment" by providing that such definitions must be "in accordance with standards prescribed by the Secretary." Section 407(a) of the Act. Congress authorized the Secretary to prescribe standards principally in order to eliminate existing discrepancies in the hours-worked criteria that had been adopted by the states as partial definitions of "unemployment." See *Macias* v. *Finch*, 324 F. Supp. 1252, 1256-1257 (N.D. Cal.), affirmed *sub nom. Macias* v. *Richardson*, 400 U.S. 913. Those discrepancies have been eliminated. 45 C.F.R. 233.100(a)(1). But Congress did not insist that otherwise a single, uniform national definition of "unemployment" would be required. To the contrary, by permitting the states to determine unemployment "in accordance with standards prescribed by the Secretary" rather than "as defined by the Secretary," Congress evidently contemplated that the Secretary would be free to prescribe standards that allow the states discretion to vary somewhat the coverage of their programs in response to their differing needs and policies. The language and history of the amendment fall

short of mandating a single, exclusive federal definition of "unemployment." Moreover, the AFDC-UF program is a cooperative federal-state venture that of necessity requires the accommodation of diverse, often conflicting, needs and interests, in which complete uniformity of implementation is not necessarily desirable. Thus the Secretary's regulation is not unreasonable merely because it leaves some measure of discretion to the states.

It is, moreover, consistent with the statutory purpose to permit eligibility for AFDC-UF benefits to turn upon whether the father is out of work for reasons that would render him ineligible for state unemployment compensation. Both in the statute and its legislative history, Congress recognized that the reason why an individual is not working may appropriately be considered in determining his comparative need for relief. See Section 407(b)(1)(B) of the Act; Jt. App. 43a-45a. State unemployment compensation programs reflect the same legislative understanding.

Furthermore, unemployment compensation serves substantially the same purpose as AFDC-UF relief, as Congress was aware. See Section 407(b)(2)(C)(ii) of the Act. Since eligibility for either form of relief in large part turns upon the fact of "unemployment," it is not unreasonable to give that term the same substantive content in each scheme. That is what the Secretary's regulation permits the states to do, and that is all that Maryland has done here.

2. The courts below should have had no occasion to reach the further question whether the Secretary has authority to allow the states discretion to deny AFDC-UF benefits when the father is out of work due to his "participation in a labor dispute." 45 C.F.R. 233.100(a)(1). Maryland's denial of AFDC-UF benefits to the respondent

strikers rested upon the fact that they were ineligible for unemployment compensation; that ineligibility in turn rested upon the fact that the strikes in question had resulted in a "stoppage of work." See p. 3, *supra*. Maryland apparently does not deny unemployment compensation and AFDC-UF benefits merely because of "participation in a labor dispute" without regard to work stoppage. Thus the denial of AFDC-UF benefits to the respondent strikers was based upon the "disqualification for unemployment compensation" clause, not the "participation in a labor dispute" clause, of the Secretary's regulation.

In any event, the courts below agreed that strikers could appropriately be treated as not "unemployed." Their quarrel with the regulation is that it delegates to the states the choice of either paying or not paying benefits to strikers with "no standards whatsoever" (Jt. App. 85a).[6] But, as is indicated above (pp. 7-8, *supra*), such a

[6]In holding the regulation invalid for a failure to prescribe standards, the court of appeals left standing that portion of the regulation that establishes an hours-worked criterion of unemployment. Since Maryland's denial of benefits to strikers was inconsistent with that criterion, construed as an exclusive definition of "unemployment," the court concluded that the state's regulations were invalid. Petitioner Chamber of Commerce, in No. 75-1182, argues that, as a matter of statutory interpretation, strikers are not "unemployed," and that to require the payment of welfare benefits to them is incompatible with the system of collective bargaining fostered by the National Labor Relations Act. This issue, however, does not warrant review by this Court at this time. Cf. *Kimbell, Inc.* v. *Employment Security Commission of New Mexico*, No. 75-1452, appeal dismissed for want of a substantial federal question, October 4, 1976. If the Secretary's regulation is sustained, under Maryland's regulation AFDC-UF benefits would be denied to the strikers here; in that event this case would present no occasion for consideration of the question raised by the Chamber of Commerce. Furthermore, whether strikers may be treated as unemployed under the Social Security Act, and, if so, in what circumstances, are matters to be

delegation was within the contemplation of Congress in amending the Act.

3. The question of the validity of the Secretary's regulation is important. The decisions of the courts below cast doubt upon the extent of the Secretary's authority to permit existing variations in the program coverage of the various state AFDC-UF plans and thereby upon the validity of certain denials of benefits under several of those plans.[7] Plenary review by this Court would obviate the need for case-by-case litigation with respect to each affected state plan.[8]

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decided in the first instance by the Secretary and the states. See also note 1, *supra*. Accordingly, if the Secretary's present regulation with regard to strikers is held invalid due to a failure to prescribe standards, he should be permitted to reconsider the matter and to develop appropriate standards before this Court passes final judgment on the underlying question of statutory interpretation. Since the Secretary might conclude that benefits should not be paid to strikers under any circumstances, consideration in this litigation of the question raised by the Chamber of Commerce would be premature.

[7]For example, eight jurisdictions deny benefits when the father has been discharged for cause (California, Guam, Iowa, Kansas, Nebraska, New York, Pennsylvania and West Virginia) and eight deny benefits to the families of at least some categories of strikers (Guam, Iowa, Kansas, Kentucky, Minnesota, Nebraska, Oregon, and West Virginia).

[8]On August 8, 1975, the Secretary published a Notice of Proposed Rulemaking setting forth for public comment a proposed amendment to his regulation. 40 Fed. Reg. 33461; see Jt. App. 121a-124a. We are informed that the Secretary has no present intention of adopting the proposed amendment. Thus, contrary to respondents' suggestion (Br. in Opp. 3-4), and unlike the situation that pertained when this Court considered *Francis I*, the question presented here is not likely to be deprived of prospective significance by an imminent amendment to the Secretary's regulation.

CONCLUSION

The petition for a writ of certiorari in No. 75-1181 should be granted. The petition for a writ of certiorari in No. 75-1182 should be denied.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

OCTOBER 1976.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

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RICHARD A. BATTERTON, ET AL.,
Petitioners,

v.

BARRY BETHEA, ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-1181

RICHARD A. BATTERTON, ET AL.,
Petitioners,

v.

ROBERT FRANCIS, ET AL.,
Respondents.

RICHARD A. BATTERTON, ET AL.,
Petitioners,

v.

BARRY BETHEA, ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The *per curiam* opinion of the Court of Appeals, which is not reported, is reprinted in the Joint Appendix filed with the petition at Jt.A. 100a. The opinions of the United States District Court for the District of Maryland in the two cases which were consolidated on appeal are reported as *Francis v. Davidson,* 379 F. Supp. 78 (1974) (hereafter *Francis-II)* and *Bethea v. Mason,* 384 F. Supp. 1274 (1974) (hereafter *Bethea)* and are reprinted at Jt.A. 79a and Jt.A. 86a, respectively.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). The judgment of the Court of Appeals was entered on September 22, 1975. On November 20, 1975 Mr. Chief Justice Burger ordered that the period for filing a petition for a writ of certiorari be extended to February 19, 1976, and the petition was filed on that latter date. The petition was granted on November 8, 1976.

QUESTION PRESENTED

Whether the regulation of the Secretary of Health, Education, and Welfare ("HEW") which permits the States to exclude from their programs of aid to families with dependent children of unemployed fathers (AFDC-UF) those families in which the father is not working because of his participation in a labor dispute or because of conduct resulting in disqualification for unemployment compensation, violates Section 407(a) of the Social Security Act, 42 U.S.C. 607(a), which directs the Secretary to prescribe standards for State determinations of unemployment in the AFDC-UF program.

STATUTES AND REGULATIONS INVOLVED

The challenged Maryland administrative regulation held invalid below, COMAR 07.02.09.10A(2) (formerly Rule 200.X.A.2), provides as follows:

> A grant may not be paid from GPA-E or AFDC-E:[1]
>
> * * * * * *
>
> 2. To meet need due to being disqualified for unemployment insurance.

The HEW regulation, 45 C.F.R. 233.100(a)(1), also held invalid below, provides in pertinent part:

[1] AFDC-UF is known in Maryland as AFDC-E, for "aid to families with dependent children—employable."

> If a State wishes to provide AFDC for children of unemployed fathers, the State plan under Title IV — Part A of the Social Security Act must . . . [exceptions not relevant here]:
>
> (1) Include a definition of an unemployed father . . . . Such definition must include any father who:
>
> (i) Is employed less than 100 hours a month; or
>
> (ii) Exceeds that standard for a particular month, if his work is intermittent and the excess is of a temporary nature as evidenced by the fact that he was under the 100-hour standard for the prior 2 months and is expected to be under the standard during the next month; except that, at the option of the State, such definition need not include a father whose unemployment results from participation in a labor dispute or who is unemployed by reason of conduct or circumstances which result or would result in disqualification for unemployment compensation under the State's unemployment compensation law.[2]

The above State and Federal regulations were held invalid under Sec. 407(a) of the Social Security Act, 42 U.S.C. 607(a), which provides:

> The term "dependent child" shall, notwithstanding section 606(a) of this title, include a needy child who meets the requirements of section 606(a) (2) of this title, who has been deprived of parental support or care by reason of the unemployment (as determined in accordance with standards prescribed by the Secretary) of his father, and who is living with any of the relatives specified in Section 606(a) (1) of this title in a place of residence maintained by one or more of such relatives as his (or their) own home.[3]

[2] The full text of this regulation is reprinted at Jt.A. 124a.

[3] The full text of 42 U.S.C. 607 is reprinted at Jt.A. 34a.

STATEMENT OF THE CASE

A. Proceedings in *Batterton v. Francis*

In this case, petitioners (hereafter "Maryland") are contesting the denial of a motion to vacate an injunction originally entered on March 6, 1972, requiring the State to pay AFDC-UF benefits to the two classes represented by the plaintiffs (hereafter "claimants"), i.e., those fathers disqualified from unemployment insurance because they were engaged in labor disputes, those disqualified because they were discharged for misconduct, and the families of fathers disqualified for either of these reasons.

The two named claimants in the action, Robert Francis and Edward Wright, were residents of Baltimore City who alleged that they had been denied illegally certain welfare benefits for their families and themselves by the Baltimore City Department of Social Services pursuant to Rule 200.X.A.2, quoted above. Said administrative regulation had been promulgated by a predecessor agency to the Social Services Administration of the Maryland State Department of Employment and Social Services (now the Department of Human Resources). Defendants in the action were the then Maryland State Secretary of Employment and Social Services (now Secretary of Human Resources) and the Director of the Social Services Administration. The Secretary of Human Resources acting through the Director of Social Services is charged, *inter alia,* with supervision, coordination, policy- and rule-making authority for public welfare programs within the State, including the AFDC-UF program.

According to the complaint, set out in the Appendix to this brief (App. 6), and the supporting papers, Robert Francis had been employed by American Smelting and Refining Company in its Baltimore plant since October 1, 1951 as a laboratory technician. Mr. Francis was a

member of Local 5877, United Steel Workers of America (AFL-CIO) which had a collective bargaining agreement with his employer. On July 1, 1971, that union and its members, including Mr. Francis, struck the plant and Mr. Francis did not report for work from that date to the filing of the complaint. As alleged, Mr. Francis' employment was the sole source of income for his wife and six children ranging in age from 6 to 13. After going on strike, Mr. Francis had not been able to find other employment. Since he was unemployed because of a work stoppage which resulted from a labor dispute in which he was participating, Mr. Francis was disqualified from receiving unemployment compensation pursuant to Section 6(e) of the Maryland Unemployment Insurance Law (Jt.A. 40a). On July 6, 1971, his family was denied AFDC-UF benefits under Rule 200.X.A.2 because of his disqualification for unemployment insurance (App. 10).

Claimant Edward Wright, who intervened in the action, was discharged on May 12, 1971 from his job as a carpenter by his employer, Wagoner Construction (App. 18). Upon his application for unemployment insurance benefits, it was determined that he was discharged for gross misconduct under Section 6(b) of the Maryland Unemployment Insurance Law (Jt.A. 40a) on the grounds of excessive absenteeism. After the denial of unemployment insurance, Mr. Wright applied for and was denied AFDC-UF benefits for his wife, his 15 year old child, and himself (App. 18).

The original complaint in the action was filed on August 9, 1971 (App. 2). In it claimants requested that Rule 200.X.A.2 be declared illegal and that its enforcement be permanently enjoined. Claimants also sought the convening of a three-judge District Court and certification as a class action on behalf of all other persons similarly situated. The complaint contended that the Maryland regulation violated the Equal

Protection Clause, Section 407 of the Social Security Act, 42 U.S.C. 607, and the HEW regulation promulgated thereunder, 45 C.F.R. 233.100(a) (App. 11).

After the convening of a three-judge panel, the District Court issued an extensive opinion ruling on cross-motions for summary judgment, 340 F. Supp. 351 (1972) (hereafter *Francis-I)* (Jt.A. 2a). In that opinion, the District Court specifically rejected the constitutional claim under *Dandridge v. Williams,* 397 U.S. 471 (1970). Pursuant to its pendent jurisdiction, however, the court held that the Maryland regulation violated the HEW regulation then in effect with regard to claimants and the classes which they represented. Thereafter, on March 6, 1972, the Court enjoined the Maryland regulation as violative of the HEW regulation (Jt.A. 54a). Maryland appealed that injunction to this Court. In an *amicus curiae* memorandum the Solicitor General urged this Court to summarily affirm the lower court ruling on the grounds that the Federal regulation was ambiguous and the Secretary of HEW intended to amend it in order to clarify its meaning (Jt.A. 56a). As to the effect of the proposed revision of the HEW regulation on the Maryland regulation, the Solicitor General stated:

> We are informed that under the proposed provision the regulation will expressly permit the States to vary, within limits, the coverage of their program on the basis of factors other than the number of hours worked. This revision should remove any doubt concerning the validity of Maryland's Rule 200.X.A.2. *Such a regulation is clearly within the authority granted by the basic statute.* (Jt.A. 60a) (Emphasis supplied)

This Court then summarily affirmed the decision below, 409 U.S. 904 (1972) (Jt.A. 61a).

On July 12, 1973, HEW did amend its regulation in the manner indicated, as quoted above, 38 Fed. Reg. 18549 (Jt.A. 124a). Accordingly, Maryland then moved

the three-judge court to dissolve its injunction against the operation of the Maryland regulation pursuant to Federal Rule of Civil Procedure 60(b) (5). In a letter to counsel the three-judge court announced its intention to grant Maryland's motion to dissolve the injunction (Jt.A. 61a-1). However, the claimants then moved for a reconsideration of this intended action, and the District Court granted such request and set the issue for briefs and hearing (App. 4). On June 25, 1974, the District Court denied Maryland's motion to dissolve the injunction, *Francis v. Batterton,* 379 F. Supp. 78 *(Francis-II)* (Jt.A. 79a).

On July 25, 1974, Maryland filed notices of appeal of that decision in this Court and the Court of Appeals. The appeal to the Court of Appeals was designed to protect Maryland's appeal rights if this Court dismissed the appeal for want of jurisdiction. On December 9, 1974, this Court did dismiss the appeal on that basis, 419 U.S. 1042 (Jt.A. 99a). The Court of Appeals then affirmed the *Francis-II* decision in a *per curiam* opinion (Jt.A. 100a), and Maryland filed a petition for a writ of certiorari in this Court.

B. Proceedings In *Batterton v. Bethea*

The *Bethea* case is an action in which another group of persons barred from benefits under Maryland's AFDC-UF program by Rule 200.X.A.2, families with fathers disqualified for unemployment compensation because they voluntarily left work without good cause ("voluntary quits"), also challenged the constitutional, statutory and regulatory validity of the regulation. The Bethea case was filed on August 29, 1973. In the complaint (App. 28) claimant Barry Bethea alleged that about July 3, 1973 he resigned his employment as a truck driver/delivery man for a liquor store after a dispute with the employer concerning payment for stolen bottles. When he applied for unemployment

insurance he was denied benefits because it was determined that he had voluntarily left his employment without good cause under Section 6(a) of the Maryland law (Jt.A 89a, n.8). Thereafter, his application for AFDC-UF payments for his wife, his 10-month old child, and himself was denied because of this disqualification (App. 31).

The claimants in the *Bethea* action asserted essentially the same claims as those in the *Francis* case. The District Court entered an opinion dated November 27, 1974 granting claimant's motion for summary judgment, 384 F. Supp. 1274 *(Bethea)* (Jt.A. 86a). Maryland's appeal of this order to the Court of Appeals was consolidated with the appeal pending in *Francis-II*.

On September 22, 1975, the Court of Appeals by a *per curiam* opinion affirmed both the *Francis-II* and *Bethea* decisions for the reasons stated by the District Court therein, and adopted the District Court opinions as its own (Jt.A. 100a). Maryland then petitioned this Court for a writ of certiorari.

C. Decisions in *Batterton v. Francis* and *Batterton v. Bethea*

In the *Francis-II* decision the District Court first noted that the HEW regulation upon which *Francis-I* was based had been changed in response to that decision (Jt.A. 79a). Next, the District Court considered separately the validity of the new regulation under the statute with regard to the two classes of persons involved in the *Francis* litigation. The court held that persons disqualified for misconduct reasons are still unemployed, i.e. "The statute relates to the unemployment of a father — and a father who is discharged for cause by his employer is unemployed" (Jt.A. 89a). It further stated that until Section 407(a) was amended ". . . no combination of federal and state regulations may provide that a father who is unemployed is not

unemployed." *(Ibid.)* As to those out of work as a result of a labor dispute the District Court stated: "That amendment [to the HEW regulation] established no standards for the State to follow and simply permitted each State to do as it chose" (Jt.A. 84a). Therefore, the court held that amendment was invalid as to both categories of claimants involved in the case and it did not cure the defects in the Maryland regulation.

In the *Bethea* decision the District Court wholly accepted the rationale in *Francis-II* (Jt.A. 96a). The court rejected the State's claim that the *Francis-II* decision was not controlling because of factual difference, i.e. that *Francis-II* involved only those unemployment situations occasioned by misconduct or labor disputes, whereas *Bethea* concerned unemployment resulting from "voluntary quits." The decision held that a father out of work as a result of voluntarily quitting was just as unemployed as a father discharged from his employment for cause (*Ibid.*). The court described the federal regulation as being "incompatible with the federal statute" (*Ibid.*), thus making the Maryland regulation invalid as applied to the claimants and their class in that case.

SUMMARY OF ARGUMENT

This case, which has been before this court on two previous occasions, now presents the issue of the nature and scope of the grant of express rule-making authority to HEW contained in Section 407(a) of the Social Security Act. The courts below did not directly address that question and instead focussed their attention on whether the categories of claimants were, in fact, "unemployed" and whether HEW had established Federal standards under the statute. However, since they declared that the HEW regulation, 45 C.F.R. 233.100(a), violated the statute under these tests, and since it is clear that the Maryland regulation was in

compliance with the HEW regulation, the question before the Court is whether Section 407(a) gave HEW authority to adopt that regulation in its present form. The labor law question, whether the statute bars AFDC-UF payments to strikers, is not before the Court at the present time.

Section 407(a) directs HEW to prescribe standards for State determinations of unemployment in the AFDC-UF program, but does not mandate an exclusive national definition of unemployment. It is true that in some places the legislative history of the 1968 amendments refers to a "federal definition of unemployment" under Section 407(a). However, when all of the legislative history of the statute and the words used in the statute are considered together, it is clear that the Congress did not intend that all families with fathers who might fall within a dictionary definition of the term "unemployment" were to be eligible for benefits. Congress was primarily interested in having HEW establish a reasonable standard, a "middle ground", with regard to the hours worked criterion for determining who was unemployed, which HEW did shortly after the statute was adopted. The legislative history does not show that Congress intended to deny States all discretion with regard to other factors related to the program in connection with eligibility determinations. Furthermore, Section 407(a) constituted a grant of "legislative type" rule-making authority to HEW. Therefore, HEW was given very broad discretion with regard to the type of standards which it could adopt, and courts should avoid substituting their own views and policy preferences for the policy decisions of HEW unless such decisions are clearly arbitrary, unreasonable or beyond the scope of the statute.

As amended by HEW after the *Francis-I* decision, 45 C.F.R. 233.100(a) is a reasonable exercise of the broad rule-making authority granted by Section 407(a). The

denial of benefits to persons disqualified under State unemployment compensation laws is consistent with the statute and Congress' intent that the program not benefit persons who are "voluntarily unemployed." Congress expressed its intent by the amendments to the program adopted in 1968. Attempts at the State level to harmonize the operations and coverage of the AFDC-UF and unemployment compensation programs are proper in light of the similar purposes and coverage of the two programs. Therefore, it is reasonable not to permit persons to receive benefits under the AFDC-UF program for conduct which results in their denial of benefits under the unemployment compensation program. In fact, as the courts below recognized, there is a basis for upholding such a denial of benefits to strikers even if the HEW regulation is deemed improper with regard to a person disqualified from unemployment compensation because of his misconduct or because he voluntarily quit his job.

The decisions below are contrary to the principles developed by this court in recent years concerning State eligibility conditions in the public assistance programs created by the Social Security Act. In effect, the decisions by the courts below constitute a use of a presumption of eligibility with regard to persons who arguably fall within the language of the Social Security Act. This Court expressly rejected that approach in *Burns v. Alcala,* 420 U.S. 575 (1975), and the major AFDC eligibility cases which preceded it. The decisions below also reject the teaching of *New York State Department of Social Services v. Dublino,* 413 U.S. 405 (1973), that State eligibility conditions are to be judged in relation to the purposes of the Social Security Act.

The decisions below also violate this Court's holdings concerning the scope of judicial review of agency rule-making. The analyses in the *Francis-II* and *Bethea* decisions concerning claimants denied benefits because

of misconduct or because they voluntarily quit ignore the statutory language authorizing HEW to prescribe standards and constitute no more than a statement of the lower courts' views as to who is unemployed and who should be covered under the statute. The portion of the *Francis-II* decision dealing with coverage for strikers does not address the question as to why no discretion can be granted to States in this regard and, in effect, compels a federal mandate that all strikers either be eligible for AFDC-UF or be barred from receiving it. That approach is not supported in any way by the language of the statute or the legislative history. By improperly substituting their judgment for that of the Federal agency charged with the enforcement and the interpretation of the statute, the courts below deny to States the discretion granted to them under the Social Security Act, and such action could discourage State participation in the program which is now in operation in only one-half of the States. Since Section 407(a) grants HEW broad authority to prescribe standards and since 45 C.F.R. 233.100(a) (as amended after the *Francis-I* decision) sets reasonable standards consistent with the intent and purposes of the statute, the HEW regulation and the Maryland regulation which complies with it are valid.

ARGUMENT

As indicated, this litigation began in 1971 and has been before this Court on two previous occasions. Despite its lengthy and complicated course, the case now presents a single and relatively clear-cut issue for the Court's resolution. Section 407(a) was amended to its present form in 1968 for the express purpose of creating Federal standards which would govern State determinations of unemployment in the AFDC-UF program. In 1969, pursuant to the grant of rulemaking authority contained in the amended statute, HEW promulgated a regulation, 45 C.F.R. 233.100(a), which

established an hours worked criterion for State definitions of unemployment. The regulation provided that a State plan for the AFDC-UF program had to have a definition of an unemployed father which included:

> . . . any father who was employed less than 30 hours a week, or less than three-fourths of the number of hours considered by the industry to be full time for the job, whichever is less, and . . . which may include any father who is employed less than 35 hours a week or less than the number of hours considered by the industry to be full time for the job whichever is less. (Jt.A. 37a) 34 Fed. Reg. 1146 (Jan. 24, 1969).[4]

Claimants in their complaint in *Francis* attacked Rule 200.X.A.2 on the ground, among others, that it violated the Federal regulation. The three-judge court in the *Francis-I* decision held that the Maryland regulation went beyond the confines of the HEW regulation, which the Court construed as providing an exclusive definition of unemployment in connection with eligibility for the program. After the summary affirmance of *Francis-I* by this Court, HEW did amend its regulation as the Solicitor General had advised this Court it intended to do. The amended regulation expressly authorized the States to bar persons disqualified from unemployment compensation as is done by Maryland Rule 200.X.A.2, 38 Fed. Reg. 18549 (July 12, 1973) (Jt.A. 124a).[5]

By its decisions in *Francis-II* and *Bethea*, the District Court held that the Maryland regulation was still invalid because the statute mandated benefits to persons disqualified because of misconduct or as

[4] This regulation was amended shortly after the filing of the *Francis* action, with the major change being the adoption of a 100 hours-a-month test instead of 30 hours-a-week as in the original version. 36 Fed. Reg. 13604 (July 21, 1971).

[5] HEW stated in the notice of proposed rule making that the amendment was a response to the *Francis-I* decision, 38 Fed. Reg. 49 (January 3, 1973) (Jt.A. 80a, n.3).

"voluntary quits," since they were "unemployed" under the statute. The District Court also held that although persons participating in a labor dispute, *i.e.* strikers, could be considered as not unemployed, the HEW regulation was invalid because it failed to prescribe a uniform "Federal standard." It was not asserted that the Maryland regulation was contrary to the amended version of the Federal regulation. Claimants had conceded that if the amended HEW regulation was valid under the statute, the Maryland regulation was valid and Maryland could deny AFDC-UF benefits to claimants and others in their circumstances.

Therefore, the issue now presented by the decisions below is whether Section 407(a) of the Social Security Act granted HEW sufficient authority to adopt 45 C.F.R. 233.100(a) in its present form. That is true even though, as pointed out by the Solicitor General in his memorandum in support of the petition for certiorari herein, the courts did not directly address that question (S.G. 6). It is also clear that at this stage of the proceedings the issue is not one of "labor law", i.e., whether the Federal scheme governing labor relations prohibits AFDC-UF payments to strikers.[6] That is the contention raised by the intervenor Chamber of Commerce of the United States of America in its petition for a writ of certiorari,[7] but this Court did not act upon the petition.

[6] See 45 U.S.L. Wk. 3336 (November 9, 1976).

[7] No. 75-1182.

I.

SECTION 407(a) GRANTS HEW BROAD AUTHORITY TO PRESCRIBE FEDERAL STANDARDS FOR STATE DETERMINATIONS OF UNEMPLOYMENT WHICH STANDARDS ARE VALID IF THEY ARE REASONABLE UNDER THE STATUTE.

A. Section 407(a) Directs That HEW Prescribe Federal Standards, But Does Not Mandate a Uniform National Definition of Unemployment.

The key issue in this case is the construction to be given to the words contained in Section 407(a) ". . . unemployment (as determined in accordance with standards prescribed by the Secretary) . . . ." The determination of "unemployment" of a father is critical in the operation of the program because the finding of "deprivation", and thus eligibility for AFDC benefits, depends upon it, Section 406(a) of the Social Security Act, 42 U.S.C. 606(a). The claimants contended the HEW regulation was invalid not only because it allowed the States to exclude certain persons who were "unemployed" under the statutory term, but also because it improperly granted discretion to the States. In other words, claimants asserted that the statutory language mandated the adoption of an exclusive national definition of unemployment for all States wishing to enter the program and that definition was to be in accord with the ordinary dictionary meaning of the term "unemployment". In support of this contention claimants rely heavily upon selected legislative history of Section 407(a). However, the legislative history and the language of the provision do not support that contention, but, only that the statute means what it says — that HEW was to adopt *Federal standards* for *State determinations* of unemployment.[8]

[8] Much of the pertinent legislative history is set forth in Appendix D to the *Francis-I* decision (Jt.A. 42a). Additional excerpts are included in the Appendix to this brief (App. 37).

The Congress first amended the Social Security Act in 1961 to authorize AFDC payments to families in which the need arose as a result of unemployment, P.L. 87-31, 75 Stat. 75. At that time Section 407 authorized AFDC for families deprived of support "by reason of the unemployment (as defined by the State) of a parent. . . ." *Ibid.* That language, however, was amended in 1968 to its present form, as quoted above, P.L. 90-248, 81 Stat. 882. Under the statute as it existed prior to 1968, the States were left with discretion as to the number of parents eligible for assistance, the required connection of the parents with the work force, whether the assistance was a supplement to or a substitute for those eligible for unemployment compensation, and how many hours worked a month constituted employment. As the Under Secretary of HEW, Wilbur Cohen, reported to the Congress, "the difference between the State programs" under the statute was great. States were defining unemployment "as narrowly or broadly" as they wished, "requiring substantial previous work experience or no work experience." Thus in some States, many families were qualifying for assistance while in adjacent States very few were meeting the State definitions, Statement by Wilbur J. Cohen on H.R. 12080 before the Senate Committee, on Finance, Hearing on Social Security Amendments of 1967, Part I, page 268, August 23, 1967 (App. 39).

In order to correct these inequities, Congress amended Section 407, resolving the number of parents problem by substituting the word "father" for "parent", resolving the question of connection with the work force by requiring a father to meet certain tests of prior attachment to the work force in order to be eligible for assistance, and at least partially resolving the question of the relationship of eligibility for AFDC-UF benefits and unemployment compensation by prohibiting AFDC assistance if a father was receiving unemployment compensation. See *Philbrook v. Glodgett,* 421

U.S. 707 (1975). With regard to the key problem of too broad or narrow State definitions, the Congress deleted the reference to the definitional power of the States and substituted instead the present language directing HEW to prescribe standards for the State determinations of unemployment.

The Report of the House Ways and Means Committee gave the following explanation of that last change:

> A major characteristic of the law is the authority left to the States to define "unemployment." Your Committee believes that this has worked to the detriment of the program because of the wide variation in the definitions by the States. In some instances, the definitions have been very narrow so that only a few people have been helped. In other States, the definitions have gone beyond any thing that the Congress originally envisioned. Your Committee's bill is designed to correct this situation and to make other improvements in the program.
>
> The overall objective of the amendments proposed by the Committee is to authorize a Federal definition of unemployment by the Secretary (but within certain limits set forth in legislation) . . . . H.R. Rep. 544, 90th Cong. 1st Sess. pp. 107-8 (1967). (Jt.A. 46a)

Claimants have pointed to several references throughout the legislative history of the 1968 amendments to a "uniform definition" or "Federal definition" of unemployment, e.g., S.Rep., No. 744, 90th Cong., 1st Sess., p. 160 (App. 37); Committee Print, Brief Summary of Major Provisions and Detailed Comparison with Prior Law, the Social Security Amendments of 1967 — Public Law 90-248, 90th Congress, U.S. Senate Committee on Finance, p. 3 (July 25, 1968) (App. 38); Statement by Wilbur J. Cohen, *supra* (App. 39). On the other hand different portions of the legislative history accurately describe the authority and responsibility given to HEW in terms closer to the statutory language:

"The amendments also provide that the Secretary will prescribe standards for the determination of what constitutes unemployment." Joint Committee Print, Summary of Social Security Amendments of 1967, U.S. Senate Committee on Finance and House Committee on Ways and Means at 17 (December 1967) (App. 39); 113 Cong. Rec. Pp. 36373-4 (Dec. 13, 1967) (an explanation of Conference Committee report on Social Security Amendments of 1967 of Representative Mills) (App. 38). Maryland concedes that the various documents which make up the legislative history behind Section 407(a) are less than crystal clear as to whether the Congress was making a general grant of legislative type of rule-making authority to HEW or whether it was mandating that the agency adopt a single national definition for the term unemployment. An example of that cloudiness is H.R. Rep. No. 544 which accompanied the original bill as it was recommended to the House of Representatives by the Ways and Means Committee. That report at page 17 first describes the change in 407(a) as providing that the "definition of unemployment would be made by the Federal Government" (which reference is quoted in *Francis-II* (Jt.A. 85(a)) (App. 39); it then states at page 108 that the bill's language would "authorize a Federal definition of unemployment by the Secretary", as quoted above (App. 39); and finally, in the section-by-section analysis at page 175, the report uses the actual words in the statute to describe its effect (App. 40).

Thus, many reports and the long hours of debate on the 1968 amendments produced different phraseologies as to the exact intent of the change in 407(a). For that reason these materials cannot be interpreted in a vacuum, but must be considered in connection with the actual words used in the statute. Less thought is given to the future effect of committee reports and floor statements than to choosing the words of the statute, Cox, *Judge Learned Hand And the Interpretation of Statutes*, 60 Harv. L. Rev. 370, 381 (1947). This Court

itself has long held that the most persuasive evidence for the purpose of the statute is the "words by which the legislature undertook to give expression to its wishes." *Perry v. Commerce Loan Company,* 383 U.S. 392, 400 (1966) quoting *United States v. American Trucking Association,* 310 U.S. 534, 543 (1940). Thus, the references by claimants to various Committee Reports, and statements of Congressmen and others for support of their position must be tempered by the particular words used by the Congress, i.e. "as determined in accordance with the standards prescribed by the Secretary."

The most significant fact in interpreting this legislative history is that Congress chose not to merely substitute the word "Secretary" for the word "State" as it existed in the statute adopted in 1961. That obviously would have been the easiest and clearest way to mandate HEW to promulgate an exclusive Federal definition as claimants maintain was intended. Instead, Congress chose to rewrite the phrase entirely and to delete the reference to a definition. It must be concluded that Congress intended each and every word, and that all are necessary to express the Congressional intent, *e.g. Richards v. U.S.,* 369 U.S. 1, 11 (1962); *McDonald v. Thompson,* 305 U.S. 263, 266 (1938). The District Court, itself, in *Francis-I* noted the significance of this change in wording. In describing that change, the court stated:

> . . . When Congress removed the parenthetical words "as defined by the State," and substituted the words "as determined in accordance with standards prescribed by the Secretary" Congress did not simply substitute "as determined by the Secretary." Thus, Congress used words which did not mandatorily require the Secretary to require each state to adopt the same meaning of the word "employment" but instead merely *authorized* the Secretary to prescribe a national meaning if the Secretary so desired. 340 F. Supp. at 367 (emphasis in original) (Jt.A. 26a).

This language accurately sums up the intent and meaning of Section 407(a), as amended, when the legislative history and the words of the statute are considered together.

B. The Regulation Which HEW Adopted Pursuant to the Grant of Broad Rule-Making Authority in Section 407(a) Should not be Held Invalid Unless it is Arbitrary and Beyond the Scope of Statutory Authority.

Section 407(a) clearly grants HEW "legislative-type" rule-making authority, See Davis, *Administrative Law Treatise,* Sections 5.03-5.04 (1957 edition) 1970 supplement and *Administrative Law Of The Seventies* (1976). Such rule-making involves the establishment of statutelike standards pursuant to a delegation of authority by the legislature, *ibid.; e.g. American Telephone & Telegraph Co. v. United States,* 299 U.S. 232, 236-7 (1936). This Court has recognized that some rules fall in this category, *Morton v. Ruiz,* 415 U.S. 199, 236, (1974); *Charles Ilfeld Co. v. Hernandez,* 292 U.S. 62, 65 (1934). The significance of a legislative-type rule is that it is to be treated as valid and binding if it is within the granted power and not unreasonable or arbitrary, *Davis, supra; American Telephone and Telegraph Company v. United States, supra* at 236-7, (1936); *Citizens To Preserve Overton Park v. Volpe,* 401 U.S. 402, 416 (1971). See Wright, *The Courts and The Rulemaking Process: The Limits of Judicial Review,* 59 Cornell L. Rev. 375 (1974). Thus, there is a "presumption of regularity" or validity which attaches to a regulation such as 233.100(a) unless it can be shown that HEW acted in a manner not authorized or contemplated, or unreasonable, under the statute.

This presumption of validity of a legislative-type of regulation appears to derive from the established principles of administrative law, that courts should

avoid substituting their own views for the policy decisions of agencies charged with the administration of programs, and that even greater deference is in order in construing regulations of such agencies, e.g. *Bowles v. Seminole Rock Co.,* 325 U.S. 410, 413-14 (1945); *Udall v. Tallman,* 380 U.S. 1, 16-18 (1965). This Court has recently held that this respect for the construction of a statute by the agency charged with enforcing it also applies to HEW and the State agencies in connection with the interpretation and application of the Social Security Act:

> In interpreting this statute, we must be mindful that "the construction of a statute by those charged with its execution shall be followed unless there are compelling indications that it is wrong. . . ." (citations omitted) *New York State Department of Social Services v. Dublino,* 413 U.S. 405, 421 (1973).

Section 407(a) clearly grants such a legislative type of rulemaking authority to HEW. The distinguishing factor of such authority is delegation by the legislature to the agency to prescribe such rules. Section 407(a) certainly embodies such a delegation. The statute in its original form expressly granted very broad definitional powers to the States and the 1968 amendment did not restrict that delegation but instead transferred some of the authority embodied therein to the Federal agency as well as to the States. Claimants have not contended that the 1968 amendment cut back on this grant of rulemaking power. All of their arguments in this regard go to the question of whether there was to be an exclusive Federal definition as opposed to a prescription of standards by HEW. The District Court has not directly addressed the question of the scope of HEW's authority in this regard, but instead has ". . . substituted its judgment for that of the agency." *Citizens To Preserve Overton Park v. Volpe, supra* at 416. In fact, there are no "compelling indications" that 45 C.F.R. 233.100(a) goes beyond the statute, since it accomplishes the intent

of the statute and grants only limited discretion to the States which is reasonable under the statute.

II.

45 C.F.R. 233.100(a) PRESCRIBES REASONABLE STANDARDS FOR STATE DETERMINATIONS OF UNEMPLOYMENT UNDER SECTION 407(a).

Since 407(a) did not mandate an exclusive national definition of unemployment, in considering the validity of 45 C.F.R. 233.100(a) this Court must consider the specific standards embodied in the regulation to determine whether they are reasonable or consistent with the provisions of the statute. As indicated, they must be upheld if they are reasonable, even if the Court might choose more broad or more narrow standards if it were required to fashion its own definition of unemployment. As this Court has recognized, the AFDC-UF program is a "scheme of cooperative federalism", *King v. Smith,* 392 U.S. 309, 316 (1968), which must deal with the problems of increasing financial dependence and mounting welfare costs, *New York State Dept. of Social Services v. Dublino, supra* at 413-14. Because of the severity of these problems:

> . . . state governments, in cooperation with the Federal Government, must be allowed considerable latitude in attempting their resolution. *Ibid.*

Therefore, complete uniformity of implementation is not a basic goal of the program and the Secretary's regulation is not invalid merely because it leaves some measure of discretion to the States.

A. The Hourly Test for Unemployment Contained in 45 C.F.R. 233.100 Fulfilled the Statutory Intent to Bring About More Uniformity in the AFDC-UF Program in the Various States.

In determining whether 45 C.F.R. 233.100(a) is in accord with the Section 407(a), one must look at all

features of the regulation to determine whether, in fact, it does prescribe reasonable standards for the States. In its original form in 1969 and after its amendment in 1973, the regulation has always included an hours worked test for determining unemployment.[9] In its present form that test provides that a State shall include in its definition of an unemployed father a father who generally works less than 100 hours per month.[10] As the legislative history of 407(a) indicates, the major purpose of the grant of rulemaking authority to HEW was to achieve more uniformity among States' definitions of unemployment. The major discrepancies existed in the amounts of part-time work which would bar coverage in the different states. For that reason HEW had always taken the position that the primary function of the regulation under 407(a) was to establish a reasonable hours-worked criterion for the determination of unemployment.

The other major case involving the validity of this particular regulation, *Macias v. Finch,* 324 F. Supp. 1252 (N.D. Calif. 1970), affd. *sub nom. Macias v. Richardson,* 400 U.S. 913 (1970), confirms this view of the purpose of the regulation. *Macias* involved a challenge to both the legality and constitutionality of the California AFDC-UF program adopted pursuant to the original version of 45 C.F.R. 233.100(a). In discussing the statutory basis of the regulation, the District Court noted that the memorandum submitted by HEW in support of its motion to dismiss described the wide

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[9] See p. 13 and notes 4 and 5, *supra.*

[10] Jt.A. 124a. The present regulation contains no provision prohibiting States from including persons who worked more than 100 hours per week from coverage under the program. These hourly tests permit a finding of "deprivation", but a family still must meet a needs test for receipt of AFDC benefits, Section 402(a) (8), 42 U.S.C. 602(a) (8).

variations among the States as to the hours worked tests used in determining unemployment prior to the 1968 amendment. The court stated that these variations were the reason for the amendment to 407(a), and held, therefore, that the Federal regulation complied with the Congressional intent and was consistent with Section 407(a), 324 F. Supp. at 1256-57.

B. The Limited Grant Of Discretion To The States Contained In 45 C.F.R. 233.100(a) Is Reasonable Under The Statute.

1. *The denial of benefits to persons disqualified from unemployment compensation.*

The legislative history of Section 407, the terms of the statute itself, and the nature of the operations of the AFDC-UF establish that eligibility restrictions related to the operation of State unemployment compensation programs are fully consistent with the purposes of the statute. The authors of Section 407 were primarily interested in establishing a program which would help those persons who were involuntarily unemployed. The program was also intended to provide coverage to needy unemployed persons who had exhausted their coverage under the unemployment compensation program. Clearly it was not intended to benefit unemployed persons whose unemployment resulted from their own conduct. In his message proposing legislation, President Kennedy stated:

> Under the Aid to Dependent Children program, needy children are eligible for assistance if their fathers are deceased, disabled or family deserted. In logic and humanity, a child should also be eligible for assistance if his father is a needy unemployed worker — for example, a person who has exhausted unemployment benefits and is not receiving adequate local assistance . . . President's Message to Congress on Program for Economic Growth and Recovery, U.S. Code Cong. and Admin. News, 87th Cong. 1st Sess. 1032.

The bill as introduced was substantially modified by the Ways and Means Committee of the House of Representatives. Many of these changes were directly related to ensuring that the program would provide assistance only to families of the involuntarily unemployed. Thus, when the bill was being considered by the House for passage, Representative Byrnes, a co-sponsor of the bill and the ranking minority member of the Committee, stated:

> What the legislation does is to add the new category which says that if the breadwinner is able to work and if he is involuntarily unemployed and no work is available we will treat that family in the same manner we treat the family when the breadwinner is dead, absent or incapacitated. I recognize and I think the committee recognizes, that as we move into this category of involuntarily unemployed people, we do have an additional problem, namely the determination of whether it is really involuntary unemployment. In the case of disabled breadwinner you can test that reality. In the case of his absence from the home, you can test that and determine whether for a fact that situation exists. The death of the breadwinner is a certainty. But here we do get the problem of determining whether, in fact, this breadwinner is involuntarily unemployed and I put the emphasis on the word "involuntary."
>
> If you will look at the Bill on page two, you will find the additions made by the Committee to assure that aid would go only to children of the involuntarily unemployed beginning at line nine, page two and going through to page three. That was added by the Committee to try to assure that we will not be giving this relief to people who in a sense may be more or less voluntarily unemployed and who are refusing work. I think it appropriate that this legislation is enacted on a temporary basis so that we can see how it is administered by the States and those in charge of the program with respect to the determination of whether or not the people who receive this aid or the families who

receive this aid are in a situation where the breadwinner is truly in fact involuntarily unemployed. . . . 107 Cong. Rec. 3767 (March 10, 1961).

Claimants have attempted to explain away this statement by Congressman Byrnes asserting that all that was meant by being "involuntarily unemployed" was a refusal of a bona fide job offer after becoming unemployed. If that were the case, Congressman Byrnes would not have explicitly stated that the AFDC legislation is designed to extend aid only if the breadwinner is "able to work" *and* "involuntarily unemployed." It seems clear that the Congressman used both factors as reasons for disqualifying a former wage earner and his family from AFDC-UF assistance. Nor did any member of the Senate voice views inconsistent with this philosophy. Indeed, the Senate specifically amended the house bill to give States the option to deny assistance to families in which the unemployed parent was receiving unemployment compensation. These statements and actions of the Congress at the time the program was first created show its intent not to extend assistance to the voluntarily unemployed and thereby conflict with the already well established unemployment compensation programs in effect in all the States.

The subsequent amendments to the program illustrate a Congressional desire to tie the AFDC-UF program even more closely to the operations and purposes of the unemployment compensation program. The 1968 amendments made many changes in the program which closely tied it to the unemployment compensation programs operating in all the States. These changes included the disqualification of fathers receiving unemployment compensation (42 U.S.C. 607(b) (2) (C) (ii)); the requirement that a father be currently registered with the State Employment Office, which is also a requirement of unemployment compensation (42 U.S.C. 607(b) (2) (C) (i)); and the establishment of a connection with the work force by the receipt of unemployment compensation or a showing that compensation would be paid if the father were in "covered" employment (42 U.S.C. 607(b) (1) (C) (ii) and (d) (3) (A) and (B)). These changes indicate a strong Congressional desire to supplement the coverage of existing unemployment compensation programs but not to duplicate or subvert those programs in any way. This Court pointed out the purpose of the unemployment compensation program in its decision in *California Department of Human Resources Development v. Java,* 402 U.S. 121 (1971), when it stated: "The objective of Congress was to provide a substitute for wages lost during the period of unemployment not the fault of the employee." *Ibid.* at 130. The statement of President Kennedy proposing the AFDC-UF program expressly indicates the same goal of assisting workers whose unemployment and need are not the result of their own conduct.

In addition to the general coextensiveness of the purposes of the AFDC-UF and unemployment compensation programs, the unemployment compensation disqualifications specifically are consistent with the goals of the AFDC-UF program. Commentators indicate that the disqualifications have three main objectives: (1) the furtherance of the primary purpose of the program to assist only those who are unemployed involuntarily; (2) the limiting of the risks to employers by eliminating certain events over which they could exert little control; and (3) the deterence of the type of conduct which leads to the severance of employment relationships and to disqualification.[11] Almost all

[11] Sanders, *Disqualification For Unemployment Insurance,* 8 Vand. L. Rev. 307 (1959); Burns, *Unemployment Compensation and Socio-Economic Objectives,* 55 Yale L.J. 1 (1949); Harrison, *Eligibility and Disqualifications for Benefits,* 55 Yale L.J. 117 (1945).

States have adopted disqualifications in their unemployment compensation programs similar to those in Maryland. That is probably the case because the present State acts are based on model legislation circulated by Federal officials at the time of the passage of the Federal legislation.[12] Certainly it is not unreasonable to decide not to pay AFDC-UF benefits because of conduct which most of the States reasonably have decided should disqualify a person for unemployment compensation.

2. The denial of benefits to persons participating in a labor dispute.

As pointed out in the Solicitor General's *amicus curiae* memorandum (S.G. 8-9), claimants here were not disqualified because of their participation in a labor dispute but rather because they were disqualified under Maryland law for the receipt of unemployment compensation. Therefore, the District Court had no occasion to reach the question of whether HEW had authority to allow States discretion to deny AFDC-UF benefits when the father was out of work due to his participation in a labor dispute.[13]

Nevertheless, a decision by this Court with regard to the portion of the HEW regulation concerning disqualifications from unemployment compensation is likely to address the validity of the other option given to the States concerning participation in labor disputes. The reasons supporting the denial of benefits to persons

[12] Larson and Murray, *The Development of Unemployment Insurance in the United States,* 8 Vand. L. Rev. 181 (1959).

[13] As the Solicitor General suggested, Maryland under its regulation does not deny AFDC-UF benefits merely because of participation in a labor dispute. The claimant must be disqualified from unemployment compensation. Therefore, the Maryland regulation at issue here does not apply to those persons who are not covered by the States unemployment insurance compensation program.

disqualified from unemployment compensation also apply with regard to the denial of benefits to strikers. Certainly such persons can be considered voluntarily unemployed. In fact, as the District Court conceded, they are not necessarily unemployed (Jt.A. 83a). By criticizing the HEW regulation only because of its lack of "national standards", the District Court appeared to uphold the agency's authority to exclude such persons from the category of "unemployed".[14]

Another reason supporting a regulation denying benefits to strikers is the fact that the program is not really planned to assist them. For example, Section 407 requires that in order to receive AFDC-UF benefits, an unemployed father must be registered with the State Public Employment Offices, must accept any reasonable offer of employment, and must be referred to the Secretary of Labor within 30 days for participation in a work incentive program, 42 U.S.C. 607 (Jt.A. 34a). It makes no sense to assign a striking employee to a training project designed to prepare him for employment in the regular economy when he is likely to resume work in his regular job as soon as the strike has ended. Nor does it make sense to refer him to another job only to have him leave his new employer, with all the consequent disruptions, when the strike is settled. Rather than assume that Congress contemplated such exercises in futility, it is reasonable to adopt a construction of "unemployment" which is both consistent with the purposes of the AFDC-UF statute and

[14] As noted by the Solicitor General in his *amicus curiae* memorandum, HEW published a notice of proposed rulemaking after the *Francis-II* decision which would again amend its regulation, 40 Fed. Reg. 33461 (Jt.A. 121a). The proposed amendment adopts the view of the decision given in the text by requiring all States in the program to deny AFDC-UF benefits to persons whose participation in a labor dispute could or does result in disqualifying them from unemployment compensation, *Ibid.* The Solicitor General states that HEW has determined to withhold further action on that proposed amendment for the present time. (S.G. 10, n.8).

general usage in labor relations matters, *viz.*, a striker is employed — not unemployed.

3. The grant of discretion to the States to choose whether to treat such persons as unemployed.

As shown above, the legislative history makes clear that the Congress contemplated that while HEW would prescribe standards designed to limit state determinations of who was unemployed, the States at the same time would be given discretion to vary somewhat the coverage of their programs in response to their different needs and policies. In light of the broad grant of rule-making power to HEW contained in Section 407 and the uniform Federal hours-worked test, the grant of discretion to the States in two very specific areas reasonably related to the purposes and operation of the statute is not unreasonable or beyond the scope of the statute. As in the regular AFDC program, the States pay 50% of the cost of administration of the program and a substantial portion of the benefits paid, 42 U.S.C. 603(a). Therefore, of necessity, Federal supervision of the program requires the accommodation of diverse interests and views. This Court has recognized that the AFDC statutes permit the States wide discretion in several important areas, *Dandridge v. Williams,* 397 U.S. 471, 473 (1970); *Jefferson v. Hackney,* 406 U.S. 535, 542 (1970); *New York State Dept. of Soc. Services v. Dublino,* 413 U.S. 405, 412-13 (1973).

Sensitivity to the legitimate scope of this discretion is particularly important in interpreting Section 407(a). Unlike the regular AFDC program, approximately one-half of the States have decided to enter the AFDC-UF program. According to HEW statistical reports, twenty-six states, District of Columbia and Guam operated the AFDC-UF program during May 1976.[15] The HEW

[15] United States Department of Health, Education, and Welfare, National Center For Social Statistics, *Public Assistance Statistics, May 1976,* Table 5, DHEW Publication No. (SRS) 77-03100, (October 1976).

reports show that within the last two years, three states, Connecticut, Kentucky and Montana have put the program into effect, and one state, Oklahoma, has discontinued it.[16] A significant number of these twenty-six states have adopted restrictions similar to those imposed by Maryland and permitted by the HEW regulation.[17] An interpretation that Section 407(a) requires an exclusive national definition denying States any discretion in the program, would obviously influence state decisions on whether to enter or discontinue the program. Narrow restrictions on state eligibility conditions, not required under the statute, could thwart the program's general purpose of extending benefits to the families of laid-off workers in those States which have not yet implemented the program. See *New York State Dept. of Soc. Services v. Dublino, supra* at 421.

III.

THE DECISIONS BELOW VIOLATE THE HOLDINGS OF THIS COURT INTERPRETING THE SOCIAL SECURITY ACT AND ESTABLISHING THE SCOPE OF AGENCY RULE-MAKING.

The analysis of Section 407(a) and 45 C.F.R. 233.100(a) contained in the decisions below can fairly be analogized to that used by Gertrude Stein in *Sacred Emily:* "A rose is a rose is a rose is a rose." In *Francis-I,* the District Court recognized that the statute had given HEW broad discretion with regard to the establishment of guidelines for State definitions of determinations of unemployment, 340 F. Supp. at 365, (Jt.A. 23a), but it also stated:

[16] *Ibid.,* and the same report for December 1974 (April 1975) and July 1975 (November 1975).

[17] The Solicitor General indicated in his *amicus curiae* memorandum that eight jurisdictions deny benefits when the father has been discharged for cause, and eight deny benefits to the families of some category of strikers (S.G. 10, n.7). He does not indicate which, if any, of these jurisdictions have a restriction based solely on the operation of unemployment compensation disqualifications, such as Maryland's.

> . . . a man out of work because he was discharged for cause by his employer *is unemployed.* There can be no two ways about that conclusion. 340 F. Supp. at 366. (Jt.A. 24a).

In *Francis-II* the District Court raised that simple assertion to the level of the governing principle for its interpretation of Section 407(a). The court noted that the statute related to the unemployment of a father and then reiterated that a father discharged for cause "*is* unemployed" 379 F. Supp. at 81 (Jt.A. 83a). The court went on to state that "until the Congress amends the statute no combination of Federal and State regulations may provide that a father who is unemployed is not unemployed." *Ibid.* In *Bethea,* the court relied upon the analysis contained in *Francis-II,* by quoting the above two passages and not adding any further rationale. The *per curiam* decision by the Court of Appeals adopted the two opinions of the District Court as its own, without adding any further analysis. As already indicated, nowhere in these decisions did courts below address the question of the scope of the rule-making authority granted HEW.

The *Francis-II* decision did concede that strikers did not necessarily fall within the meaning of the term "unemployed". The court held, however, that by granting the States discretion to bar persons from AFDC-UF benefits, because of such participation the amended regulation "established no regulations for the States to follow" and simply permitted each State to do as it chose. The Court construed the amendment to require HEW "to establish national standards within which the regulations of each of the States were to be channelized and confined", 379 F. Supp. at 82 (Jt.A. 85a). Since the court found that the amended regulation contained "no standards whatsoever," the regulation was held to be illegal and of no effect.

The District Court's analysis with regard to persons who have been fired for cause or have voluntarily quit is not actually based on the words of the statute. The "plain meaning test" is an established method of statutory construction, but obviously when using it a Court must consider *all* the words of a statute as well as the intent of Congress in passing the statute, *United States v. Campos Serrano,* 404 U.S. 293 (1971); *Lynch v. Overholser,* 369 U.S. 709 (1962). In applying the plain meaning test to find the effect of the word "unemployment" the District Court ignored the words "as determined in accordance with standards prescribed by the Secretary." That construction violates another elementary rule of statutory construction that statutes are to be given "such effect that no clause, sentence or word is rendered superfluous, void, contradictory, or insignificant." *Rockbridge v. Lincoln,* 449 F.2d 567, 571 (9th Cir. 1971) citing *Richards v. United States,* 369 U.S. 1, 11 (1962). As this Court noted as recently as last year:

> When 'interpreting a statute the court will not look merely to a particular clause in which the general words may be used but will take in connection with it the whole statute (or statutes on the same subject) and the objects and policies of law, as indicated by its various provisions, and give to it such a construction as will carry into execution of the will of the legislature . . .' *Kokosczka v. Belford,* 417 U.S. 642, 650 (1974), citing *Brown v. Duchesne,* 60 U.S. 183, 194 (1857).

Although the *Francis-II* decision recognizes HEW's authority to prescribe standards with regard to strikers, it neither describes the type of standards contemplated by the court nor explains why the overall approach taken by HEW in the regulation does not constitute setting a standard. It is difficult to understand what the District Court believes HEW must do in order to satisfy the Congressional mandate. Does the District Court

mean, in effect, that the statute requires that HEW must either mandate payments to strikers or bar all States from making payments to such persons? HEW, in fact, has interpreted the decision in that way in its pending proposed amendment to the regulation (Jt.A. 121a).[18] Such a result is not required by the words of the statute and could hardly have been intended by the Congress. Surely it fails to establish a middle ground between too broad or too narrow State eligibility criteria.

The Congressional attitude toward barring or mandating AFDC-UF benefits to strikers, or to all the classes represented by claimants, can be analogized to the Congress's decision that a uniform policy on the payment of unemployment compensation to strikers was not necessary to the federal labor relations policies. It has been shown that the Congress refused to include a provision barring unemployment compensation to strikers as part of the major labor relations and unemployment compensation enactments, *Grinnell Corp. v. Hackett,* 475 F.2d 449, 454 (1973); *cert. denied,* 414 U.S. 858, (1973). Not only did the Congress not address that question in the National Labor Relations Act and Social Security Act when they were first adopted in 1935, *ibid.,* but it specifically rejected proposals to deny unemployment compensation to strikers when such proposals were made as part of amendments to the NLRA (H.R. 3020, 80th Cong., 1st Sess. Section 2(3) (1947)); Statement by Chairman Mills, 115 Cong. Rec. 34106 (Nov. 13, 1969). On the other hand, it is clear that when the Congress wanted to set federal standards in this area it knew how to do so, *e.g.,* 45 U.S.C. 354 (a-2) (iii); 7 U.S.C. 2014(c). Thus while the Congress was aware of different attitudes by the States as to payment of unemployment compensation to strikers it decided to permit the diversity to continue. A

[18] See n. 14, *supra.*

similar showing as to Congressional awareness of the issue is not available in connection with the more recent AFDC-UF program, but it is likely that such an awareness also existed in connection with the enactment and amendment of that program. Therefore, it is reasonable to interpret the statute as not deciding the question but rather as authorizing HEW to permit State diversity in this regard if that agency determined that diversity was consistent with the program.

The approach taken by the District Court in *Francis-II,* directly contradicts the principles established by this Court in several cases in recent years as to the proper test for the validity of State limitations on AFDC eligibility, *King v. Smith,* 392 U.S. 309 (1968); *Townsend v. Swank,* 404 U.S. 282 (1971); *Carleson v. Remillard,* 406 U.S. 598 (1972); *New York State Dept. of Soc. Services v. Dublino, supra; Burns v. Alcala,* 420 U.S. 575 (1975). As this Court stated in *Alcala,* the proper test is that: ". . . once the federal standard of eligibility is defined, a participating State may not deny aid to persons who come within it in the absence of a clear indication that Congress meant the coverage to be optional" 420 U.S. at 580. The courts must first determine that the statute was intended to authorize or permit the payment of benefits to the claimants. Once that has been determined, an inquiry as to the validity of the state limitation is in order. Instead of using that method, the District Court seems to have followed the rule expressly disapproved in *Alcala* that "persons who are arguably in the federal eligibility standard must be deemed eligible unless the [Social Security] Act or its legislative history clearly exhibits an intent to exclude them from coverage, in effect creating a presumption of coverage when the statute is ambiguous" *Ibid.*

Here the legislative history shows beyond dispute a Congressional aversion, if not an express command against, the payment of benefits to persons who become

unemployed as a result of their own conduct. Further, the legislative history and the statute itself involve an express grant of broad "legislative" rule-making authority first to the States and then to the Federal government as to which persons are to be considered as eligible under the statute. By prescribing its own definition of unemployment and ignoring the grant of rule-making authority to HEW, the District Court, in effect, followed the "presumption of coverage" approach rejected in *Alcala*. Using the test set forth in *Alcala*, the legislative history behind section 407(a) shows that the standards developed by HEW fulfill the Congress' intent as to the elimination of wide disparities between State programs and they grant State discretion in the one area in which the Congress did not favor the payment of benefits. Since claimants do not fall within the federal standard, except insofar as HEW permits States to include them, the State's exercise of the option permitted by HEW is clearly valid. See *Alcala v. Burns*, 410 F. Supp. 1024 (S.D. Iowa 1976).

The decisions below are also inconsistent with the recent decision by this Court concerning a related aspect of the AFDC-UF program, *Philbrook v. Glodgett*, 421 U.S. 707 (1975). That case involved the meaning of the word "receiving" in Section 407(b) (2) (C) (ii) which, as indicated provides that payments may be made only to a father who ". . . is not receiving Unemployment Compensation during the same week as assistance is granted." Vermont had construed that provision to allow it to deny payments to fathers who were "eligible" for unemployment compensation for the same week. The Court first stated that Vermont's construction of the statute was contrary to the actual words of the statute, but then went on to examine the legislative history of the provision. Since these documents, although somewhat ambiguous, did not really support the State's interpretation, the Court concluded that the

literal meaning of the statute was to be applied. Therefore, fathers eligible for, but not receiving, unemployment compensation, could receive AFDC-UF. Similar close attention in this case to all of the words of the statute, as well as the legislative history, leads to the conclusion that the HEW regulation is valid, and, therefore, the Maryland restriction on AFDC-UF payments is also valid.

The *Francis-II* decision clearly violates the principles discussed earlier governing the treatment of "legislative" rule-making, *supra* at 20-22. In the *Francis-II* decision the District Court erroneously substituted its own interpretation of the statute for that of the agency charged with the administration of the program, HEW, e.g. *Bowles v. Seminole Rock Co.*, 325 U.S. 410, 413 (1945); *Udall v. Tallman*, 380 U.S. 1, 16-18 (1965). That administrative decision was entitled to particular respect because it was a "legislative" rule which the Congress had expressly directed the agency to develop for the implementation of the statute, rather than an interpretative rule, adding an administrative gloss to a statutory term. See Davis, *Administrative Law Treatise*, Secs. 5.03 and 5.04, and cases cited therein (1958 and 1970 Supplement). The District Court must find that the HEW regulation was arbitrary, unreasonable or beyond the scope of the statute, before substituting its own views as to the meaning of the statute. Such finding was not made because in the *Francis-II* decision the court did not address the nature of HEW's rule-making authority and the proper scope of judicial review of such legislative rule-making. The decisions of this Court, cited earlier make clear that the scope of judicial review of a legislative-type rule is limited and that a court is not to substitute its judgment for the administrative agency's when the regulation is a reasonable exercise of the statutory authority, e.g. *American Tel. and Tel. Co. v. United States*, 299 U.S. 232, 236-7 (1936); *Citizens To*

Preserve Overton Park v. Volpe, 401 U.S. 402, 416 (1971); *New York State Dept. of Soc. Services v. Dublino, supra* at 421. Since 45 C.F.R. 233.100(a), as amended, fulfills the intent and command of Section 407(a) that HEW prescribe reasonable Federal standards that eliminate the previous wide variations in the program among the States, the regulation is a valid rule under the statute.

CONCLUSION

For the foregoing reasons, Maryland requests that the decisions below be reversed and the District Court be directed to vacate the injunctions entered therein.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-1181

RICHARD A. BATTERTON, *et al.*,
Petitioners,

v.

ROBERT FRANCIS, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR RESPONDENTS

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IN THE

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OCTOBER TERM, 1976

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v.

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ON WRIT OF CERTIORARI TO
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FOR THE FOURTH CIRCUIT

BRIEF FOR RESPONDENTS

SUMMARY OF ARGUMENT

The Social Security Act requires states participating in the AFDC-UF public assistance program to grant monetary benefits to the needy children of fathers who are "unemployed (as determined in accordance with standards prescribed by the Secretary [of Health, Education and Welfare]). . . ." 42 U.S.C. §607(a). The Secretary has partially defined "unemployment" to allow a participating state to exclude from AFDC-UF

eligibility children who fathers are ineligible for state unemployment compensation benefits. 45 C.F.R. §233.100(a)(1). Maryland employs this optional definition and has therefore found the respondent claimants, who represent three classes of children whose fathers are ineligible for Maryland unemployment benefits, to be ineligible for AFDC-UF benefits. The claimants contend that the Secretary's regulation contravenes the Social Security Act and is therefore invalid.

Rather than defining "unemployment" in terms of hours worked, money earned, services rendered, or the existence of a current contractual relationship, the Secretary has defined it by eligibility for another income maintenance program which basically turns on the reasons a father lost his last job. Thus, for example, a father who lost his last job due to alleged misconduct is ineligible for Maryland unemployment insurance. The Secretary's definition permits Maryland to make his children also ineligible for AFDC-UF benefits. Consequently, the Secretary has defined the statutory term "unemployment" to include a person out of work due to losing his job for misconduct as being not "unemployed." Because no rational definition could possibly define such a person as not "unemployed," the Secretary has exceeded his congressional mandate and acted invalidly.

Congress' 1967 charge to the Secretary of define "unemployment" in the AFDC-UF program was intended to eliminate the widespread lack of uniformity in AFDC-UF eligibility conditions throughout the nation. Congress sought a uniform, federal, nationwide definition of unemployment in all participating AFDC-UF states. Instead of meeting such congressional demands, the Secretary has abdicated his definitional duty and authorized the states to grant AFDC-UF to

those ineligible for unemployment insurance and to those out of work due to a labor dispute, or to deny either of these classes or their many different subclasses AFDC-UF benefits. The Secretary thereby has permitted a different set of AFDC-UF eligibility standards to exist in each of the roughly 26 states participating in the program. The AFDC-UF application of a child of an unemployed father could therefore be treated in an entirely different fashion by each of these states. Because this result obviously flouts congressional intentions, the Secretary's regulation, for this reason also, clashes with the Social Security Act's dictates.

If these were not reasons enough for the three unanimous courts below to have invalidated the Secretary's regulation, a review of the Act's structure, wording, and legislative history further compels this conclusion. These factors are evaluated in the final section of this Brief.

ARGUMENT

The only remaining live issue in this third appearance of this case before this Court is whether a regulation promulgated by the Secretary of Health, Education, and Welfare in July 1973, 45 C.F.R. §233.100(a)(1), is contrary to 42 U.S.C. §607(a), and therefore invalid. This was the sole issue before the district courts and court of appeals below. The parties agree that, if the regulation is valid, Maryland can deny AFDC-UF benefits to the claimants and their classes. The parties also agree that, if it is not valid, Maryland cannot deny these children AFDC-UF benefits. In the latter situation, the district court's permanent injunction should not be altered. The district courts and the Fourth Circuit have held the regulation, as is relevant to

these cases, to be invalid. For the reasons outlined below, the claimants (respondents) support this position.

A. Because The Secretary Contravened Congress' Mandate By Defining Unemployed Persons As Not Unemployed, His Regulation Is Invalid.

The simplest approach to this case involves no complicated reasoning or resort to legislative history. Because the Social Security Act directs that AFDC-UF benefits be granted to the children of those fathers who are, *inter alia*, "unemployed," and because the Secretary's actions have excluded from this category two classes of people who are clearly "unemployed," *i.e.*, those out of work due to misconduct and voluntarily quitting, the Secretary's regulation is invalid.

Section 407(a) of the Social Security Act, 42 U.S.C. §607(a), requires that states participating in the program must give AFDC-UF to

> a needy child . . . who has been deprived of parental support or care by reason of the unemployment (as determined in accordance with standards prescribed by the Secretary) of his father. . . .

The Secretary's regulation, however, has excluded from his definition of "unemployment" persons who in fact are clearly "unemployed," namely, those claimants who are no longer working because they were released from their prior jobs due to their alleged misconduct or due to allegedly quitting these jobs without good reason. *See* 45 C.F.R. §233.100(a)(1) (J. App. 125a).

Addressing this situation in the first district court opinion (*Francis I*), the three-judge court noted:

> A man out of work because he was discharged for cause by his employer *is unemployed*. There can be no two ways about that conclusion.

(J. App. 24a) (emphasis in original). It therefore found the Maryland regulation to invalidly conflict with the then existing H.E.W. regulation which required AFDC-UF benefits to be paid to the children of "unemployed" fathers.

After the H.E.W. regulation was altered to attempt to circumvent *Francis I*, the district court again came to the same result, this time due to the above-quoted mandatory statutory requirement that AFDC-UF benefits be paid to the children of "unemployed" fathers. In *Francis II* the court similarly concluded:

> The statute relates to the unemployment of a father—and a father who is discharged for cause by his employer *is* unemployed. . . . Until the Congress amends the statute, no combination of federal and state regulations may provide that a father who is unemployed is not unemployed.

(J. App. 83a) (emphasis in original).

The district court in *Bethea* similarly applied this seemingly unquestionable logic to the class of persons unemployed due to having voluntarily quit their last job. It found that "a father who voluntarily quits his job is unemployed within the meaning of 42 U.S.C. §607(a)." (J. App. 96a). After reiterating that only a congressional amendment could allow the Secretary to define as employed someone who is clearly unemployed, the court held that the H.E.W. regulation and Maryland rule were invalid as contrary to the federal statute. *Id.*

By adopting on appeal the district court opinions in *Francis II* and *Bethea* as its own (J. App. 103a & 104a), the Fourth Circuit fully embraced this reasoning.

The claimants concede that some ambiguity arises as to whether a person on strike is "unemployed."[1] With respect to the other two classes, however, the statutory command could hardly be more clear. Claimants submit that because the H.E.W. regulation attempts to define as not "unemployed" two groups of persons who obviously are "unemployed," the seven unanimous federal judges to review this case thus far were correct in invalidating the regulation as conflicting with the federal statute.

B. Because He Failed To Promulgate A Uniform Federal Definition Of Unemployment, The Secretary's Regulation Is Invalid.

Although there may be other ambiguities in the legislative history relevant to this case,[2] Congress' intent is perfectly clear on one highly relevant matter: its desire for a standard nationwide definition of "unemployment" established by the Secretary of Health, Education, and Welfare.

Under the original 1961 AFDC-UF enactment, Pub. L. 87-31, §407, 75 Stat. 75 (1961), the definition of who was an "unemployed parent" was left to each participating state. *See, e.g., Macias v. Finch*, 324 F.Supp. 1252, 1256 (N.D. Cal.), *aff'd*, 400 U.S. 913 (1970). In order to correct the injustices incurred due

[1] Maryland, however, has shown no hesitancy in defining strikers as "unemployed" persons. Although strikers are ineligible for state unemployment insurance, they are nevertheless classified as "unemployed": a person cannot receive unemployment benefits in Maryland "for any week [in which] . . . his unemployment is due to a stoppage of work, other than a lockout. . . ." Md. Ann. Code, art. 95A, §6(e) (1969).

[2] *See, e.g., Francis I, supra* (J. App. 23a n. 25).

to the consequent "wide variation in the definitions used by the States,"[3] Congress amended the Act, effective 1968, so that "the definition of unemployment would be made by the Federal Government."[4] Thus, in order to attain "a uniform definition of unemployment throughout the United States,"[5] Congress amended the Act to grant a child's father benefits

[3] H.R. Rep. No. 544, 90th Cong., 1st Sess. 108 (1967), *quoted in Francis I* (J. App. 46a). *See Philbrook v. Glodgett*, 421 U.S. 707, 719 (1975). Then Under Secretary Wilbur Cohen, testifying before the Senate Finance Committee, pointed out a typical situation of three adjoining states where, due to varying definitions of unemployment, only 19 Arizona families were receiving AFDC-UF in May 1967, while at the same time 1600 in Colorado and 880 in Utah were receiving AFDC-UF. Statement before Committee on Finance on H.R. 12089, U.S. Senate, August 22, 1967 (App. 39).

[4] H.R. Rep. No. 544, 90th Cong., 1st Sess. 17 quoted in *Francis II*, (J. App. 85a); *see* Summary of Provisions of H.R. 12080, The "Social Security Amendments of 1967," House Comm. on Ways & Means 13 (Comm. Print 1967) (App. 37); Brief Summary of Major Provisions & Detailed Comparison with Prior Law, The Social Security Amendments of 1967–Public Law 248, 90th Cong., U.S. Senate Comm. on Finance 3 (Comm. Print 1968) ("Federal definition of unemployment") (App. 38); Statement by Wilbur J. Cohen, Under Secretary of H.E.W. before U.S. Sen. Comm. on Finance, Social Security Amendments of 1967 (Aug. 22, 1967) 8 ("Federal definition of unemployment") (App. 39); 113 Cong. Rec. 32592 (Nov. 15, 1967) (Remarks of Sen. Long); *id.* at 32852 (Nov. 16, 1967) (Remarks of Sen. Ribicoff).

[5] S. Rep. No. 744, 90th Cong., 1st Sess. 4 (1967) (App. 37) (Note: the word "unemployment" in the quotation above is printed incorrectly in the Appendix as "employment."); *see* H.R. Rep. No. 544, 90th Cong., 1st Sess. 3 (1967) ("uniform eligibility requirements throughout the United States").

if he had been "unemployed (as defined by the Secretary). . . ."[6]

Congress' 1967 amendment, therefore, provided that AFDC-UF benefits be given to

> a needy child . . . deprived of parental support or care by reason of the unemployment (as determined in accordance with standards prescribed by the Secretary) of his father. . . .

42 U.S.C. §607(a).

Rather than promulgating a uniform definition of unemployment, however, the Secretary in July 1973 abdicated his statutory duty by promulgating a regulation that declared that a state's definition of unemployment

> need not include a father whose unemployment results from participation in a labor dispute or who is unemployed by reason of conduct or circumstances which result or would result in disqualification for unemployment compensation under the State's unemployment compensation law.

45 C.F.R. §233.100(a)(1) (J. App. 125a).

This definition presents each participating state with a multitude of different options as to which of its unemployed fathers can receive AFDC-UF benefits for

[6]H.R. Rep. No. 544, 90th Cong., 1st Sess. 108 (1967); *see* Brief Summary of Major Provisions & Detailed Comparison with Prior Law, The Social Security Amendments of 1967—Public Law 248, 90th Congress, U.S. Senate Comm. on Finance 63 (Comm. Print 1968) ("Unemployment will be defined by the Secretary of Health, Education, and Welfare") (App. 38).

their children.[7] Thus, there could be a different AFDC-UF system operating in each state. A needy child

[7]Under the Secretary's regulation any combination of the three following classes could be excluded from AFDC-UF eligibility by a state: (1) strikers, (2) those engaged in conduct which disqualifies them from receipt of unemployment benefits, and (3) those engaged in conduct which could disqualify them from unemployment benefits. This latter category would presumably apply to the one-third of the working force not covered by state unemployment insurance schemes, *e.g.*, governmental and many agricultural workers. A state could, therefore, disqualify all of these classes, none of these classes, or any combination (just 1, just 2, just 3, 1 plus 2, 2 plus 3, or 1 plus 3). Presumably, even more options could be created if differing types of disqualifying conduct were treated differently, *e.g.*, "misconduct" versus "voluntarily quitting" versus "gross misconduct." *See, e.g.*, Md. Ann. Code, art. 95A, §6 (1969), which lists Maryland's grounds for disqualification.

Colorado, for example, provides for more than twenty separate reasons for disqualification for unemployment compensation:

> (1) quitting because of dissatisfaction with pay, hours of work, or working conditions, where these are not substandard, (2) quitting because of unwarranted dissatisfaction with supervisor, (3) quitting to marry, (4) moving to another area, except for health reasons or to accept a better job, (5) lack of transportation, (6) quitting to seek other work, or to accept a job that is not better than the one quit, (7) insubordination, including deliberate disobedience of a reasonable instruction, refusal or failure to obtain or renew a necessary license, etc., (8) violation of a statute company rule that resulted or could have resulted in serious damage to the employer's property or interests, (9) off-the-job use of liquor or narcotics (other than medical use) to a degree resulting in interference with job performance, (10) any on-the-job use of liquor or narcotics, unless medically prescribed, (11) incarceration for violation of law, or loss of license essential to job through a law violation, (12) theft, (13) assault or threatened assault, (14) wilful neglect or damage to an employer's property or interests, (15) careless or shoddy work, (16) failure to safeguard employer's property, (17) taking unauthorized vacations, (18) refusal to work a different shift, (19) refusal to accept a transfer, (20) returning to school, (21)

(continued)

living in Maryland could be denied subsistence benefits while a similarly situated child in neighboring Virginia could receive these benefits.

By delegating these options to the states, the Secretary acted contrary to congressional intent. The goal of a "uniform definition of unemployment throughout the United States"[8] had been undermined. The goal of a "federal definition of unemployment"[9] had been severely compromised.

The *Francis II* court, admittedly retreating somewhat from the *dicta* in *Francis I*,[10] found that the Secretary's regulation had failed to set national standards for

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(footnote continued from preceding page)
quitting for certain personal reasons, or (22) refusal of suitable work.

Unemp. Ins. Rep. (CCH) ¶3016. Thus, reasons for disqualification in Colorado—*e.g.*, lack of transportation or refusal to work a different shift or to accept a transfer—may not be grounds for disqualification in Maryland. The problem of diversity in programs is further compounded because under the Secretary's regulation a state presumably could select any subgroup of its list of reasons for disqualification for unemployment compensation and deny these groups AFDC-UF benefits. The wide range in periods of disqualification provided for in state unemployment compensation plans could introduce yet another variable into the AFDC-UF program. For a compilation of the many varied state grounds for ineligibility and differing disqualification periods, see Comparison of State Unemployment Laws, U.S. Dept. of Labor, Manpower Administration, Unemployment Insurance Service (Jan. 1972).

[8] *See* references cited in note 5, *supra*.

[9] *See* legislative sources cited in note 4, *supra*.

[10] *Compare* 340 F.Supp. at 367 (J. App. 26a) *with* 379 F.Supp. at 81 (J. App. 85a). It would appear that a primary reason for the district court's shift in position is attributable to the fact that counsel had failed, prior to the briefing of *Francis II*, to provide the court with the full legislative history as it is partially portrayed in notes 3 to 6, *supra*, and accompanying text.

defining unemployment. (J. App. 84a-85a). Instead, it had done what Congress after 1968 was no longer willing to do: allow each state to choose its own variety of "unemployment." The court therefore ruled the H.E.W. regulation invalid and refused to modify its prior injunction.[11] The Fourth Circuit affirmed this reasoning (J. App. 103a).

Maryland's Brief to this Court seeks to make a useful distinction between the Secretary's duty to "prescribe standards" rather than "define" unemployment. (Claimants submit that this is a mere play on words. A "definition" would be composed of "standards." These "standards," in their totality, would equal a "definition." The distinction is uneventful. Of superior importance is the substance of what Congress intended to be achieved. A uniform nationwide AFDC-UF system is surely not achieved by giving states a broad range of optional systems of AFDC-UF benefits depending on each state's own definition of unemployment insurance eligibility. By failing to promulgate uniform standards, the Secretary failed to effect a *standard* AFDC-UF system. It was this additional shortcoming which correctly led the courts below to declare the Secretary's regulation invalid.

C. Congress Intended The Claimant Children To Be AFDC-UF Beneficiaries

Normally, when the plain meaning of Congress' words is understood, there is no need to inquire beyond

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[11] Because the *Bethea* court ruled that H.E.W. could simply not declare an unemployed father to be not unemployed (J. App. 96a), this ground served to invalidate the H.E.W. regulation with respect to fathers who allegedly voluntarily quit their prior jobs, and therefore it was unnecessary for the court to reach this second basis of invalidity.

these words into the legislative history which led to enactment. Therefore, if claimants are convincing on either of their first two arguments, which were adopted by the three courts below, this Court need not reach this additional analysis into what Congress' actions show it intended.

In effect, the Secretary and Maryland are attempting to engraft an additional optional condition of eligibility onto the AFDC-UF program, namely that certain reasons for losing one's past job can disqualify that person's family from future AFDC-UF eligibility. In order to succeed in such a venture, the state carries the burden of establishing "a clear indication that Congress meant the coverage to be optional." *Burns v. Alcala*, 420 U.S. 575, 580 (1975). *See Townsend v. Swank*, 404 U.S. 282, 286 (1971). The claimants will show that, after a review the language of the statute and congressional statements preceeding enactment, no such clear indication can be found.

1. The Words of the Statute

The most obvious reason to negate any such congressional intent stems from the words Congress used in instructing the Secretary to define unemployment. Congress required in 42 U.S.C. §607(a) that "unemployment" be defined, not, as the Secretary would have it, that the past cause for a person's present unemployment be defined.[12] By no stretch of the

[12]The Secretary's preface to his proposed rulemaking, in fact, frankly admits that the proposed change would not be defining unemployment. The Secretary refers to imposing "additional conditions relating to the reason for unemployment. . . ." 38 Fed. Reg. 49 (Jan. 3, 1973). Reasons for unemployment do not comprise a definition of the state of being unemployed itself.

imagination could a person's status regarding "unemployment" be measured by whether a person is eligible for unemployment insurance. A definition of eligibility for unemployment insurance has nothing to do with the variables one would use in defining unemployment.[13] At best, eligibility for unemployment insurance might be seen as relating to the manner in which a worker left his last job. However, the manner in which a person

[13]A review of the federal suggestions for state unemployment programs indicates that the term "unemployed" has always been intended by the federal and state governments to include those out of work due to misconduct or voluntarily quitting, as well as those involved in a labor dispute. The Social Security Act generally left the determination of who would be eligible for unemployment compensation to each state. *See* Larson & Murray, The Development of Unemployment Insurance in the United States, 8 Vand. L. Rev. 181, 189 (1955). The federal government did, however, propose model legislation for the states to adopt for their programs. *See id.* at 196. All states appear to have included a person out of work due to misconduct or quitting as an "unemployed" person and therefore within the ambit of their program. *See* Sanders, Disqualification for Unemployment Insurance, 8 Vand. L. Rev. 307 (1955). These unemployed persons could, however, be temporarily or permanently disqualified from receiving unemployment benefits. *See generally id.* Thus, for example, Maryland's legislature, following the federally proposed model legislation, *see* Brief for Petitioners, *Batterton v. Francis*, Sup. Ct. No. 75-1181 at 28, has decided that: "An individual shall be disqualified for benefits . . . for any week in which his unemployment is due to his having been discharged for gross misconduct . . . ." Md. Ann. Code, art. 95A. §6(b) (1969). Similarly, "for any week [in which] . . . his unemployment is due to a stoppage of work, other than a lockout . . ." a person is disqualified. *Id.* §6(e). *See also id.* §6(a) (voluntary quit). Thus, Maryland clearly labels persons in claimants' classes as "unemployed." The federal model and other states similarly follow this pattern. Unemployment is defined not in terms of how one lost his prior job, but in terms of hours worked and wages earned, true determinants of present unemployment. *See* Williams, Eligibility for Benefits, 8 Vand. L. Rev. 286, 287 (1955).

was terminated from his prior job has nothing to do with his present status regarding unemployment or degree of unemployment.

A second look at the Act reinforces claimants' point. Although 42 U.S.C. §607 makes repeated references to its interrelation with state unemployment insurance schemes, it significantly fails to express any hint that it intended to permit some children of fathers ineligible for unemployment insurance to be denied AFDC-UF benefits. As is developed in the accompanying footnote,[14] Congress took great pains to explain as fully as possible how its AFDC-UF program should interreact with a state's program for unemployment insurance. This extended treatment of unemployment insurance indicates, the claimants submit, that Congress acted to define as fully as possible how unemployment benefit eligibility would affect AFDC-UF eligibility. If Congress had intended that those children of fathers who were disqualified from receiving unemployment insurance by their states could not turn to AFDC-UF benefits in

[14]Section 407 of the Act makes the children of anyone who is receiving unemployment benefits automatically ineligible for AFDC-UF. *See* 42 U.S.C. §607(b)(2)(C)(ii). The obvious reason for this would seem to be an assumption that those families supported by unemployment insurance are already being financially cared for. Also, Congress brought state unemployment laws into play by permitting a father to demonstrate his attachment to the labor force by showing that he had previously been sufficiently employed so as to qualify for state unemployment compensation within the year prior to his application for benefits. *See* 42 *U.S.C.* §607(b)(1)(C)(ii). In addition, the states participating in the AFDC-UF program are required to allow AFDC-UF fathers to register, along with unemployment insurance beneficiaries, in the state public employment offices. *See* 42 U.S.C. §607(b)(2)(C)(i). Finally, a father is allowed to meet the work force attachment requirements of 42 U.S.C. §607(b)(1)(C)(ii) if he performed work not covered by his state's unemployment compensation scheme in sufficient quantity so that if he had been covered he would have been eligible for unemployment benefits. *See* 42 U.S.C. §607(d)(3)(B).

order to attain a subsistence standard of living, would it not have said so? In light of Congress' specific reference to denying AFDC-UF benefits to those who were *eligible* for unemployment benefits, 42 U.S.C. §607(b)(2)(C)(ii), it seems clear that if it had intended the same result for those *ineligible* for unemployment benefits it would have said so. This class of fathers is of sufficient significance so as not to be dismissed as an oversight.

This result is further reinforced by the observation that there is nothing in section 407 of the Social Security Act which is in any way inconsistent with including claimants' classes within the bounds of AFDC-UF eligibility. If a father loses his job due to allegedly voluntarily quitting, for example, the Act is well tailored to both care for his children and prepare him for reentry into the work force.[15] He still can establish eligibility through his prior attachment to the work force, his willingness to accept bona fide offers of employment, and his registration with the state's job referral system. Indeed, a father in this position poses one of the very basic stereotypes intended to be served by section 407.

Thus, the wording of section 407, its structure, and its application all combine to indicate a congressional intention of inclusion of claimants' classes.

2. Legislative Statements

Two significant, although concededly not conclusive, legislative statements and actions support the claimants'

[15]The court in *Francis I* noted the same situation with respect to a striking father, who is also readily accommodated by section 407. *See* 340 F.Supp. at 367-68 (J. App. 27a).

view. First, when the 1961 AFDC-UF legislation which gave states options regarding AFDC-UF eligibility was being debated, Congressman Mills, the legislation's spokesman, in answer to a question of Representative Dominick, explicitly stated that states could grant strikers AFDC-UF benefits if they chose to do so. *See* 107 Cong. Rec. 3766 (Mar. 10, 1961). No one rose to contest this intent. This category of persons typically disqualified from receiving unemployment insurance therefore was intended by Chairman Mills to be eligible for AFDC-UF benefits.

Second, one major reason for the creation of the AFDC-UF program was to eliminate an unfortunate incentive for fathers to desert their families—the only way by which their children could be eligible for the one parent basic AFDC program.[16] The Secretary's regulation clearly undermines this congressional motivation with respect to all of those fathers in claimants' class.

[16]*See* Message of Pres. Kennedy, U.S. Code Cong. & Admn. News, 87th Cong., 1st Sess. 1032-33; 107 Cong. Rec. 3769 (March 10, 1961) (Remarks of Rep. Ryan); *id.* at 3765 (Remarks of Rep. Baldwin):

> It seems to me that the biggest single problem which has been created by the aid-to-needy children program as it exists today is that the actual wording of the present law stimulates the breaking up of homes. . . . It does not seem to me that three youngsters who may be hungry in a home where their father is unemployed should have less consideration by the Federal Government than three youngsters who are hungry in a home where the father has deserted. A father who is unemployed but who still feels a sense of family responsibility should not be penalized as compared to a father who has deserted his family and left the children and his wife on their own resources. In my own mind I cannot distinguish between the children of those two families. For that reason it seems to me that this bill should be passed so that the Congress of the United States will correct the present wording of the law which undoubtedly stimulates separation and breakup of families.

Maryland's best attempt to resurrect some congressional history support comes from the often cited statement that AFDC-UF was not intended for those "more or less voluntarily unemployed and who are refusing work."[17] This statement, however, was made in a very specific context. It refers only to a desire by Congress not to give benefits to a person who refuses bona fide job offers once he is unemployed and thereby remains voluntarily unemployed. Thus, "voluntary unemployment" in this context looks not at how the worker left his last job, but rather at his willingness to accept suitable new employment.

This fact is borne out by the full statement by Representative Byrnes, a co-sponsor of the 1961 Bill, during the House debate:

> If you will look at the Bill on page two, you will find the additions made by the committee to assure that aid will only go to children of the involuntarily unemployed beginning at line nine, page two, and going to page three. That was added by the committee to assure that we will not be giving this relief to people who in a sense may be more or less voluntarily unemployed and who are refusing work.

107 Cong. Rec. 3767 (March 10, 1961).

The references in the first part of this statement are to methods of assuring that a parent will obtain suitable new employment. The state plans were to include cooperative arrangements with public employment offices, job placement services, and public vocational training programs, as well as a requirement that

[17]Statement of Rep. Byrnes, 107 Cong. Rec. 3767 (March 10, 1961). This statement appears in the Congressional Record on the page following Chairman Mills' statement regarding AFDC-UF for strikers. It is significant that Representative Byrnes failed to question Representative Mills' statement regarding striker eligibility.

recipients accept any bona fide job offer. Thus, the safeguards which Representative Byrnes supported in the 1961 version of the Act do not deal with voluntary termination of prior employment. Rather, they accept the unemployed father as they find him—regardless of how he lost his job—and then try to assure that he will not thereafter stay unemployed voluntarily.[18]

Further evidence of a total absence of intent to disqualify those who may have been found to have voluntarily left their last job is found in a section of the 1967 House Report which catalogues the various grounds under which a father could be disqualified from eligibility for benefits. The Act was intended to provide

> for denial of aid if and for so long as such a father fails to register, refuses without good cause to participate in a work and training program under such section 409, refuses without good cause to accept employment in which he is able to engage (which is offered to him from certain sources), refuses without good cause to undergo retraining under the vocational education program, or receives unemployment compensation.

H.R. Rep. No. 544, 90th Cong., 1st Sess. at 175. It would seem that this lengthy listing would have included a reference to those who had voluntarily left a prior job if Congress had really intended what Maryland claims.

A final look at another section of the Act reinforces the claimants' position. Even if it were assumed that Maryland is correct and section 407 intended to penalize those who were unemployed due to voluntarily

[18]Representative Byrnes further explained his understanding of the program in a subsequent statement, saying that the program would "include children who are in need, where the breadwinner is able to work, wants to work, and is just unable to get it." 107 Cong. Rec. 3768 (March 10, 1961).

leaving prior employment, that penalty would only be temporary. The Act requires that

> such father has not without good cause, within such period (of not less than 30 days) as may be prescribed by the Secretary, refused a bona fide offer of employment or training for employment. . . .

42 U.S.C. §607(b)(1)(B). The H.E.W. regulation defines this penalty period as a "30-day period prior to the receipt of such aid. . . ." 45 C.F.R. §233.100(a)(3)(ii). Therefore, in order to be eligible for AFDC-UF in this respect, a father must have not refused a bona fide job offer for a 30-day period. After refusing such an offer, he could again make himself eligible if a new 30-day period passed without such a job refusal. Thus, this penalty is only temporary and results in a 30-day disqualification, not a permanent one.

The claimants concur with the *Francis I* court's observation that the final legislative intent was not clearly evinced by legislative debate.[19] The burden of convincing this Court of a contrary intention lies, however, with the petitioners. On its face the Act covers the children of "unemployed" fathers. The fathers in claimants' classes are indeed unemployed and out of work. Because their family members are facially included within the Act's coverage,

> a participating State may not deny aid to persons who come within it in the absence of a clear indication that Congress meant the coverage to be optional.

Burns v. Alcala, supra, 420 U.S. at 580. At the very least, claimants have established an absence of such a clear intent. Accordingly, they are entitled to the Act's coverage.

[19]*See* 340 F.Supp. at 366 (J. App. 24a).

CONCLUSION

For the several reasons set forth above, the judgment of the Fourth Circuit should be affirmed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

RICHARD A. BATTERTON, SECRETARY, MARYLAND DEPARTMENT OF EMPLOYMENT AND SOCIAL SERVICES, *et al.*,

Petitioners,

v.

ROBERT FRANCIS, *et al.*,

Respondent,

AND

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA,

Respondent-Intervenor.

ON PETITIONS FOR A WRIT OF CERTORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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IN THE

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OCTOBER TERM, 1976

No. 75-1181

RICHARD A. BATTERTON, SECRETARY, MARYLAND DEPARTMENT OF EMPLOYMENT AND SOCIAL SERVICES, *et al.*,

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Respondent,

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CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA,

Respondent-Intervenor.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR RESPONDENT-INTERVENOR

OPINIONS BELOW

The opinion of the Court of Appeals (Jt. App. pp. 100a-104a)[1] is not yet officially reported. The order of the federal District Court (Jt. App. pp. 79a-85a) is reported at 379 F. Supp. 78.

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[1] "Jt. App." refers to the Joint Appendix filed by the Chamber and the State of Maryland. "App." refers to the separate Appendix prepared by the Chamber, the State of Maryland, and Robert Francis and filed with the briefs.

JURISDICTION

The judgment of the Court of Appeals (Jt. App. pp. 105a-106a) was entered on September 22, 1975. On December 4, 1975, the Chief Justice extended the time in which to file petitions for a writ of certiorari to and including February 19, 1976 (Jt. App. p. 105a). Petitions by the Chamber and the State of Maryland were filed on that date, and the Court granted Maryland's petition on November 8, 1976.[2] The jurisdiction of this Court rests upon 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether federal regulations, as amended, which grant states discretion to exclude persons from federal welfare benefits whose need arises solely from their participation in a labor dispute are within congressional intent as expressed in the Social Security Act.

2. Whether state regulations which tie federal welfare eligibility to state unemployment compensation law are consistent with federal welfare policy.[3]

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[2] The Court made no separate disposition of the Chamber's petition No. 75-1182.

As a party in the courts below, the Chamber is properly a party to the instant proceeding and has entered an appearance in No. 75-1181. Sup. Ct. R. 10(4). And Maryland raised and invited consideration of the contentions urged here by the Chamber. In its Petition Maryland stated (pp. 15-16): "The question as to the eligibility of strikers for payments has come to this Court before without any final resolution of that question. (citations omitted). With the involvement of the Chamber . . . as a party, it would appear that this case might be an appropriate one for resolving this separate issue." And the courts below ruled that mandatory eligibility for striking employees was *not* contrary to or inconsistent with the separate legislative systems for aiding the employed and the unemployed. (Jt. App. 103a, 18a-20a, 84a).

[3] Francis's challenge to the Maryland regulations necessitates analysis of federal unemployment compensation standards in ruling on the validity of these regulations. The Chamber has not litigated and thus takes no position on the other eligibility questions ruled on below, namely whether employees who quit or are discharged for cause are eligible for federal welfare benefits under the AFDC-UF program.

STATUTES AND RULES INVOLVED

The relevant provisions of the Social Security Act (42 U.S.C. § 601 *et seq.*), the National Labor Relations Act (29 U.S.C. § 141 *et seq.*), the Food Stamp Act (7 U.S.C. § 2011 *et seq.*) and the Railroad Employment Insurance Act (45 U.S.C. § 351 *et seq.*) are set forth in the separate Joint Appendix.

STATEMENT

A. The Strike

Robert Francis engaged in a work stoppage on July 1, 1971, when he joined a strike in support of his collective bargaining representative at the American Smelting and Refining Co. plant where he was working. On September 10, 1971, the strike ended and Robert Francis immediately returned to his job at the American Smelting and Refining Co.

During this two and one-half month strike, Francis applied to the Maryland Employment Security Agency for state unemployment benefits. The State of Maryland, pursuant to its unemployment eligibility regulations, denied Francis unemployment benefits because his unemployment was voluntary and resulted from his own decision to participate in a labor dispute in support of his collective bargaining representative.[4] Mr. Francis then sought federal benefits under the Aid for Dependent Children—Unemployed Father program (AFDC-UF).

Francis was declared ineligible for these welfare payments on the ground that such benefits need not be paid to "meet need due to being disqualified for unemployment insurance". Thereafter, Francis, on behalf of himself and all other potential

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[4] Section 6 of Maryland's Unemployment Insurance Law, Md. Ann. Code art. 95A, § 6 (1969 Repl. Vol) provides that a claimant shall be disqualified when "his unemployment is due to a stoppage of work other than a lockout, which exists because of a labor dispute. . ."

applicants similarly situated, filed an action in Federal District Court alleging that the denial of AFDC-UF benefits violated both the Equal Protection clause of the Constitution and Section 407 of the Social Security Act, 42 U.S.C. § 607 and the HEW regulations promulgated thereunder, 45 C.F.R. 223.100(a).

B. The Initial Proceedings

Pursuant to 28 U.S.C. § 2281, a three-judge court was constituted, and on August 30, 1971, the Chamber sought leave to intervene. The District Court denied the Chamber's motion to intervene as a party but allowed it to participate *amicus curiae* (Jt. App. p. 4a). The Chamber filed a separate appeal (No. 71-1554) to this Court, limited to the intervention question, which was denied "for lack of jurisdiction." 409 U.S. 907 (1972). Thereafter, the Chamber appealed the same question to the Fourth Circuit which, on June 30, 1973, ruled it had subject matter jurisdiction because "the instant appeal is from a denial of a petition for intervention and not of an injunction." (Jt. App. p. 109a). The Court of Appeals concluded only that the district court did not abuse its discretion by denying the Chamber permissive intervention (Jt. App. p. 113a).[5]

On January 28, 1972, the three-judge court issued its first decision in this proceeding (Jt. App. pp. 2a-34a). The District Court held that Maryland's eligibility regulations violated HEW guidelines (Jt. App. p. 24a), and issued a decision requiring Maryland to pay AFDC-UF benefits to all employees whose need arose solely out of a labor dispute (Jt. App. pp. 28a-29a).

[5] The Fourth Circuit noted (Jt. App. p. 112a):

"... the district court's ruling on the Chamber's *amicus* argument [that federal labor policy prevented welfare payments to strikers] was at most, mere *dicta* and not binding on anyone. The district court [in Francis I] did not rule on the merits of the Chamber's contention; its only *holding* was that the Chamber would not be permitted to intervene." (emphasis in original).

Pursuant to 28 U.S.C. § 1253, the State of Maryland appealed the three-judge court's order to the Court. On October 16, 1972, the Court affirmed the judgment below, limited only to the validity of the Maryland eligibility regulations without opinion (409 U.S. 904), apparently in reliance upon a memorandum submitted by the Solicitor General of the United States (Jt. App. pp. 56a-60a) which concluded that the case was not ripe for plenary review because the Secretary of HEW was about to amend the relevant regulations (Jt. App. p. 60a).

C. The Instant Proceedings

On July 12, 1972, the Secretary of HEW amended 45 C.F.R. 233.100(a)(1) ostensibly to permit each State to determine whether to provide AFDC-UF benefits to the children of fathers voluntarily idled from their employment because of their election to support their collective bargaining representative in a labor dispute. The Secretary specifically stated that he was neither speaking on behalf of Congress nor responding to a specific congressional mandate (Jt. App. pp. 124a-125a).

After publication of the amended HEW regulations the Chamber timely filed a motion to intervene as a party.[6] The District Court granted this motion on January 31, 1974 without restricting in any way the scope of issues raised by this litigation (Jt. App. pp. 106a-107a). The Chamber and the State of Maryland then moved to dissolve the injunction previously entered by the District Court (Jt. App. pp. 114a-116a).

On June 25, 1974, the District Court issued its opinion, denying the motions to dissolve the outstanding injunction (Jt. App. pp. 79a-85a). The Court acknowledged that its earlier opinion "literally read" encompassed the amended regulation

[6] American Smelting and Refining Co. is a member of the Chamber, and it is that company's injury, caused by direct federal financial support under the AFDC-UF program for Robert Francis and other striking employees, which permitted the Chamber to intervene in this proceeding.

issued by the Secretary on July 12, 1973 (Jt. App. p. 84a). The three-judge court now concluded with benefit of "hindsight" that the 1968 amendment to Section 407 of the Social Security Act required the Secretary to promulgate standards rather than a national definition of unemployment. Because "(the July 12, 1973) amendment established no standards for the States to follow and simply permitted each State to do as it chose" (Jt. App. p. 84a), this amendment was held to be contrary to the Secretary's authority, and thus Maryland's regulation denying federal welfare benefits to persons participating in a labor dispute remained invalid (Jt. App. p. 85a).

The Chamber and Maryland filed concurrent appeals to this Court and to the Fourth Circuit. On December 9, 1974, this Court denied Maryland's appeal, treating the papers as a petition for a writ of certiorari before judgment. 419 U.S. 1042. On January 27, 1975, the Supreme Court denied the Chamber's appeal "for lack of jurisdiction" under 28 U.S.C. § 1253. 420 U.S. 903.

THE DECISION OF THE COURT OF APPEALS

The Court of Appeals, in a per curiam opinion, upheld the District Court and adopted its opinion (Jt. App. p. 103a). The Court concluded: "We affirm the decision below that Maryland may not exclude from the benefits of AFDC those children whose fathers are out of work because of a strike. . ." (Jt. App. 103a).

SUMMARY OF ARGUMENT

The instant case involves *inter alia* the validity of HEW regulations permitting states participating in the AFDC-UF welfare program the option to include or exclude fathers with dependent children whose "unemployment" results solely from the father's participation in a labor dispute. The challenged

HEW regulations and Maryland's disqualification rule assume that this class of claimants are at least technically eligible for cash benefits under this federal-state welfare program. This Court, however, has made clear that the question of the validity of state imposed limitations upon receipt of federal welfare benefits, whether or not consistent with current HEW regulations, can be reached only if it can be affirmatively established that the claimants are within the class of beneficiairies intended by Congress. *Burns* v. *Alcala,* 420 U.S. 575, 580-85(1975); *Carleson* v. *Remillard,* 406 U.S. 598, 603-04 (1972); *Townsend* v. *Swank,* 404 U.S. 282, 288-291 (1971); *King* v. *Smith,* 392 U.S. 309, 327-333 (1968); see also *Macias* v. *Finch,* 324 F. Supp. 1252, 1260-61 (N.D. Cal.) (three-judge court), *aff'd without opinion,* 400 U.S. 913 (1970). These decisions declare it unnecessary here to determine the deference, if any, to be given to the challenged HEW regulations until after the Court is satisfied Congress intended at least optional AFDC-UF eligibility for employed workers like Mr. Francis. The Secretary's authority to promulgate regulations is limited by section 1102 of the Social Security Act which requires such regulations to be consistent with federal welfare policy.

Here, it is not contended by Mr. Francis nor held by the courts below that there is any affirmative statutory language in the Social Security Act or in the legislative history of the AFDC-UF program suggesting that Congress mandated coverage for currently employed fathers whose need results solely from the temporary loss of wages attendant upon a strike against their employer. This legislative silence must be construed against eligibility for children of fathers on strike because, as this Court has repeatedly emphasized, Congress has not yet provided for the economic security of all dependent children. *Burns* v. *Alcala, supra,* 420 U.S. at 582-83 n. 9; *Carleson* v. *Remillard, supra,* 406 U.S. at 604; *King* v. *Smith, supra,* 392 U.S. at 330.

This conclusion is reinforced by reference to the federal definition of unemployment which excludes employees

participating in a labor dispute, and by reference to the limited purpose of the AFDC-UF program which was not intended to aid the currently employed worker. In delegating to the HEW Secretary the discretion to define "unemployment", Congress did not indicate the Secretary could disregard the definition of employee in Section 2(3) of the National Labor Relations Act, which expressly provides that a worker participating in a labor dispute retains his job and his employed status during the term of that dispute. Congress expressly limited the Secretary's definitional discretion by requiring that the unemployed parent program be limited to workers with a recent or substantial attachment to the work force. Congress thus implicitly required the Secretary to exclude from this program those workers like Mr. Francis who have a current and continuing attachment to the work force by their existing employment relationship with their struck employer. The Federal District Court acknowledged (Jt. App. 85a) that striking employees unlike employees who quit their jobs or are discharged do not necessarily fall within the definition of "unemployed".

The AFDC-UF program was created by Congress to aid employable but unemployed fathers with dependent children who had lost their jobs and had their relationship with their employer totally severed by impersonal business cycles and economic forces beyond their control. Congress left intact for employed workers the federal right to bargain collectively with their employer and thereby to use self-help including the strike weapon to advance their own economic security. Since Congress has not provided otherwise, the HEW Secretary's discretion to define "unemployment" must respect these separate systems constructed by Congress to aid two distinct groups of citizens. "Congress, by legislating as it has, has distinguished between the unemployed and the underemployed, and has applied different solutions to the problems of each group". *Macias* v. *Finch, supra,* 324 F. Supp. at 1260; see also *Carleson* v. *Remillard, supra,* 406 U.S. at 603; *Anchor Motor Freight* v. *Hines,* 424 U.S. 554, 563 (1976); *Chemical Wkrs.* v. *Pittsburgh*

Glass, 404 U.S. 157, 166 (1971); *Lewis* v. *Martin,* 397 U.S. 552, 559 (1969). Thus the Chamber, which supported Maryland in the courts below, contends, in addition to those arguments advanced by Maryland here, that the injunction requiring mandatory eligibility for employees on strike must be dissolved because Congress did not intend to benefit workers temporarily involved in a labor dispute.

Maryland's unemployment compensation regulations disqualify employees on strike for AFDC-UF benefits but permit both AFDC-UF and unemployment compensation payments to employees who are "locked out" by their employer during a labor dispute. The unemployment compensation system, like the AFDC-UF program, was originally designed by Congress in 1935 to aid workers without jobs rather than workers with jobs. *California Dept. of Human Resources* v. *Java,* 402 U.S. 121, 130 (1971); *Steward Mach. Co.* v. *Davis,* 301 U.S. 548, 586 (1937); *Personal Finance Co.* v. *United States,* 86 F. Supp. 779, 786 (D. Dela. 1949). Congress also, in section 903(a)(5) of the Social Security Act, imposed upon states seeking the tax credits allowed employer contributions to state unemployment compensation funds a mandatory duty of neutrality in any labor dispute involving strikes and lockouts to avoid state aid to one side or the other. This concept of neutrality was borrowed intact from the British unemployment compensation system which served as the model for the American system in order to avoid conflict and overlap with the concurrently enacted Wagner Act.

Maryland thus properly disqualifies employees whose "unemployment" results solely from their participation in a strike. However, the mandatory duty of neutrality also mandates AFDC-UF and unemployment compensation disqualification for employees who temporarily are locked out by their employer during collective bargaining because a lockout, like a strike, is simply another manifestation of a labor dispute, and Maryland's unemployment compensation regulations must be measured against this federal standard. The courts below

invalidated Maryland's disqualification provision and, if the Court reverses the judgment below and reestablishes these regulations, the Court must construe them in a manner consistent with federal welfare policy.

ARGUMENT

I. HEW HAS NO RULEMAKING AUTHORITY TO DEFINE UNEMPLOYMENT TO INCLUDE EMPLOYEES ENGAGED IN A LABOR DISPUTE

A. Introduction

The basic question presented in the instant case is the actual scope of HEW's delegated authority in section 407(a) of the Social Security Act to define unemployment under the federal-state AFDC-UF program. That is, whether Congress authorized the Secretary of HEW to fashion a definition of unemployment which could include fathers of dependent children whose "unemployment" results solely from their participation in a labor dispute. This Court has previously scrutinized HEW regulations only after first considering whether the claimants, subject to the HEW regulations, are affirmatively within the class of beneficiaries intended by Congress. Here Congress did not intend HEW to define the term unemployment so to apply to employed wage earners like Mr. Francis. Inclusion of employees involved in a labor dispute is inconsistent with the common understanding of "unemployment", is contrary to the limited aid purposes of the AFDC-UF program, and conflicts with other congressional legislation which provides for the income needs of employed persons through federal labor laws.

B. The Scope of HEW's Authority to Define Unemployment is Limited by the Purpose of the AFDC-UF Program

The initial Aid for Dependent Children program (AFDC) limited cash benefits to needy children. 49 Stat. 629 (1935). See *Steward Mach. Co.* v. *Davis,* 301 U.S. 548, 586 (1937),

Burns v. *Alcala,* 420 U.S. 575, 581 (1975); *Philbrook* v. *Glodgett,* 421 U.S. 707, 709 (1975). But not all needy children, the program was limited to children who "will not be benefited through work programs or the revival of industry." S.Rep. No 628, 74th Cong., 1st Sess., 17 (1935). Fifteen years later Congress authorized the payment of benefits to the adult relative of the dependent child, if the child met the State's need definition and had been deprived of the support of a parent by virtue of death, disability or absence from the home. 64 Stat. 551 (1950). In 1961 Congress amended these limited eligibility provisions to permit states to grant federal cash benefits to a needy child of an unemployed parent. Act of May 8, 1961, Pub. L. No. 87-31, §407, 75 Stat. 75, 42 U.S.C. §607. States electing to participate in this federal matching program were authorized to define "unemployment". S. Rep. No. 165, 87th Cong., 1st Sess. 3 (1961). In 1968 Congress withdrew this authority from the states,[7] and amended section 407(a) of the Act to read a needy child "who has been deprived of parental support or care by reason of the unemployment (as determined in accordance with standards prescribed by the (HEW) Secretary) of his father ..." But Congress did not grant HEW unlimited discretion to define unemployment, and whether the Secretary could include persons involved in a labor dispute within any "standard" is first a question of legislative intent. Congress imposed certain elements which it regarded as mandatory for any definition of unemployment, i.e. "to tie the program more closely to the work and training program authorized by the bill, and to protect only the children of unemployed fathers who have had a recent attachment to the work force". H.R. Rep. No. 544, 90th Cong., 1st Sess. 107-108 (1967); *Macias* v. *Finch, supra,* 324 F.Supp. at 1256-57. And these expressions of definitional limitation must be examined before consideration of whether the HEW regulations properly grant optional state coverage of benefits for persons participating in a labor dispute.

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[7] See *Philbrook* v. *Glodgett, supra,* 421 U.S. at 710 n.6.

This Court has consistently followed this *modus operandi* in other cases involving claimants who have challenged state imposed limitations upon receipt of federal welfare benefits. In *Burns* v. *Alcala, supra,* the Court examined legislative history to determine whether Congress intended to include unborn children within the scope of the definition of dependent children before reaching the propriety of the relevant HEW regulations. 420 U.S. at 580-84. In the absence of any affirmative indication that Congress intended either mandatory or optional eligibility, the Court construed legislative silence against eligibility and thus found it unnecessary to decide whether the HEW regulations were valid. 420 U.S. at 584-86. In *Carleson* v. *Remillard, supra,* the Court found it necessary to consider the Act's legislative history before concluding that HEW regulations granting optional eligibility to needy children whose fathers were "absent from the home" on military service, were inconsistent with Congressional intent. 406 U.S. at 602. In *Townsend* v. *Swank, supra,* the Court first reviewed relevant congressional materials and then concluded that Illinois could not, consistent with Congressional intent, deny federal welfare aid to college students under the age of 21. 404 U.S. at 287. The Court then was able to weigh the relevant HEW regulations in the light of this legislative history, and disapproved them. 404 U.S. at 287-6 n5. And in *King* v. *Smith, supra,* the Court reviewed the relevant statutory provisions and legislative materials before deciding whether HEW could properly approve state regulations denying welfare benefits to needy children whose mothers cohabitated with a man under no legal obligation to support the child. 392 U.S. at 333 n.34.

Here a similar review of the legislative materials is required because unless Congress intended to benefit employees engaged in a labor dispute, HEW regulations interpreted as so providing are wholly extra-statutory and exceed the Secretary's rulemaking authority limited by section 1102 of the Act (42 U.S.C. §1302) which provides in part; "[t]he Secretary of (HEW) . . . shall make and publish such rules and regulations, not inconsistent with this chapter . . ."

C. Children of Fathers Involved in a Labor Dispute are Ineligible for AFDC-UF Benefits Under Section 407(a)

1. Striking Employees are not unemployed within the meaning of Section 407(a)

In 1935 Congress defined workers, like Mr. Francis, (working for employers subject to the Labor Board's jurisdiction) whose work ceases as a consequence of a labor dispute to retain their job with their employer. Section 2(3) of the National Labor Relations Act provides an "employee" is "any individual whose work has ceased as a consequence of or in connection with, any current labor dispute . . . and who has not obtained any other regular and substantially equivalent employment." As the Court stated in *NLRB* v. *Erie Resistor Corp.,* 373 U.S. 221, 233 (1963): "§2(3) preserves to strikers their unfilled positions and status as employees during the pendency of a strike." The concept underlying this provision is that an otherwise on-going contract of employment has only been temporarily interrupted by a labor dispute. See 3A A. Corbin *Contracts: A Comprehensive Treatise on the Rules of Contract Law* §684 (rev. ed. 1960). Indeed, the Labor Board and the federal circuit courts agree unanimously that economic strikers like Mr. Francis retain employee status even after they have been permanently replaced, and the struck employer is required to offer such replaced strikers an opportunity to return to work whenever the permanent replacements depart. *Laidlaw Corp.* v. *NLRB,* 414 F.2d 99, 103 (7th Cir. 1969), *cert. denied,* 397 U.S. 290 (1970); *H&F Binch Co.* v. *NLRB,* 456 F.2d 357, 363, n.5 (2d Cir. 1972) and cases there cited. See also *Reinstatement: Expanded Rights for Economic Strikers,* 58 Calif. L. Rev. 511 (1970). Otherwise workers could not exercise the protected public rights to bargain collectively with their employer and to strike their employer, "the ultimate weapon in labor's arsenal for achieving agreement on its terms"[8] without forfeiting their jobs. H.R. Conf. Rep. No.510, 80th Cong., 1st

[8] *NLRB* v. *Allis-Chalmers,* 388 U.S. 175, 181 (1967). See also section 13 of the National Labor Relations Act. 29 U.S.C. §163.

Sess. 59 (1947). Thus, Congress regarded such workers as continuing to hold their positions during the entire term of the labor dispute to prevent these public rights from becoming illusory. See, *e.g.*, *NLRB* v. *Great Dane Trailers*, 388 U.S. 26 (1967); *Elam* v. *NLRB*, 395 F.2d 611, 613 (D.C. Cir. 1966).

Unlike such employed workers who retain a continuing employment relationship with their employer, Congress expressly limited the AFDC-UF welfare program to unemployed workers with a recent or substantial rather than a "casual" attachment to the work force—"that is, they must have either exhausted their unemployment compensation rights or have had a year and a half of work during a 3 year period ending in the year before assistance is granted." H.R. Rep. No. 544, 90th Cong., 1st Sess. 17, 108 (1967). The Senate objected only that this restriction eliminated eligibility for those most in need of aid—persons with a long jobless history, but ultimately this limitation was accepted at conference. H.R. Conf. Rep. No. 1030, 90th Cong., 1st Sess. 57-8(1967); S. Rep. No. 744, 90th Cong., 1st Sess. 28 (1967). These documents describe a legislative concept of "unemployment" applicable only to persons currently without a job. And this is emphasized by Congress' insistence that AFDC-UF eligibility be strictly tied to incentives to improve employability. "Your committee believes that . . . virtually all unemployed fathers of AFDC children can be trained for and placed in productive employment." H.R. Rep. No. 544, 90th Cong., 1st Sess. 97 (1967).

Workers like Mr. Francis possess marketable job skills and are already engaged in productive employment in the nation's economy. And, since as a matter of legislative chronology, Congress was well aware it had legislated in 1935 to preserve a continuing employment relationship between an employer and his employees engaged in a labor dispute, this 1968 amendment to section 407(a), in the absence of any indication to the contrary, constitutes literal exclusion of Mr. Francis from the AFDC-UF program. In delegating definitional authority to HEW, Congress did not intend to include in this delegation of

authority the discretion to create optional AFDC-UF eligibility for breadwinners actively participating in the work force. Thus, the fact that a worker temporarily idled during a labor dispute may literally meet the days or hours worked criteria imposed by section 407(b)(1)(A) or promulgated by HEW (employed less than 30 hours a week) is not controlling. "[I]t is a familiar rule that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers." *Holy Trinity Church* v. *United States*, 143 U.S. 457, 479 (1892). See also *Philbrook* v. *Glodgett*, *supra*, 421 U.S. at 714; *NLRB* v. *Fruit & Vegetable Packers*, 377 U.S. 58, 67 (1964); *Welsh* v. *United States*, 398 U.S. 333, 347 (1970) (J. Harlan concurring).

2. The Limited Scope of the AFDC-UF Program also Restricts HEW's Discretion to Define "Unemployment"

Section 401 of the Social Security Act, entitled "Authorization of Appropriations," explains the purpose of the AFDC program (of which AFDC-UF is a part). *Philbrook* v. *Glodgett*, *supra*, 421 U.S. at 709-11. This cash benefit assistance is:

> to help maintain and strengthen family life and *to help such parents or relatives to attain or retain capability for the maximum self-support and personal independence consistent with the maintenance of continuing parental care and protection*, there is authorized to be appropriated for each fiscal year a sum sufficient to carry out the purpose of this part". (Emphasis supplied).

An employee participating in a labor dispute, however, does not ordinarily require aid in attaining or retaining self-support capability. He is an active participating member of the work force not a part of the chronic unemployed. He also possesses sufficient job skills to perform the work he leaves when he elects to strike. Any hardship to his home environment arises solely from the decision to support a strike, not because he totally lost employment by the operation of economic forces beyond his control. Hardship arising as a

consequence of the free exercise of economic weapons is an accepted ingredient of the collective bargaining process. It is precisely this form of economic pressure which Congress believed would lead to mutually acceptable collective bargaining agreements between employers and their employees. R. Mathews, *Labor Relations and the Law* 363 (1953); *Morand Bros. Beverage Co.* v. *NLRB*, 190 F. 2d 576, 582 (7th Cir. 1951). This Court has repeatedly recognized this fundamental premise of national labor policy. "[T]he right to bargain collectively does not entail any 'right' to insist on one's position free from economic disadvantage." *Am. Ship Bldg.* v. *NLRB*, 380 U.S. 300, 309 (1965). "[T]here is nothing in the [National Labor Relations] Act which gives employees the right to insist on their contract demands, free from the sort of economic disadvantage which frequently attends bargaining disputes." *Id.* at 313. "[T]he [National Labor Relations] Act as presently drawn does not contemplate that unions will always be secure and able to achieve agreement even when their economic position is weak. . . ." *Porter Co.* v. *NLRB*, 397 U.S. 99, 109 (1970). "[T]he likely duration of the strike may increase the specter of hardship to [the striker's] family. . . ." *NLRB* v. *Granite State Jt. Bd.*, 409 U.S. 213, 217 (1972). Even when the strike or other economic weapons are not resorted to, collective bargaining is by its nature "an annealing process, hammered out under the most severe and competing forces and counteracting pressures." *NLRB* v. *Dalton Brick & Tile Corp.*, 301 F.2d 886, 895 (5th Cir. 1962). [9]

There is nothing in section 401 of the Social Security Act or its legislative history which even suggests that Congress intended to make federal welfare funds available to economically sufficient workers whose need arises solely from their exercise of

[9] See also N. Chamberlain & J. Kuhn, *Collective Bargaining* 393-94 (2d. ed. 1965); D. Bok & J. Dunlop, *Labor and the American Community* 229 (1970); Cox, *Federalism in Labor Law*, 67 Harv. L. Rev. 1297, 1317 (1954).

economic weapons during collective bargaining. *Lewis* v. *Martin*, 397 U.S. 552, 559 (1969). [10]

Nor was the AFDC-UF program created to benefit employees who engaged in a work stoppage during a labor dispute. In 1961, Congress for the first time created benefit eligibility for an unemployed father living at home with a dependent child (AFDC-UF). "At present needy families in which need is occasioned by unemployment are not eligible for any type of 'federal' assistance. . . ." S. Rep. No. 165, 87th Cong., 1st Sess. 1 (1961). This amendment was not designed to provision striking employees with children. Rather, Congress chose to relieve need specifically occasioned by widespread unemployment caused, not by labor dsiputes, but by the 1959-60 economic recession. Congress also desired to eliminate any financial incentive for the father to abandon the home to render the child eligible for benefits. Hearings on H.R. 3854 and H.R. 3865 before the House Committee on Ways and Means, 87th Cong., 1st Sess. 94-95 (1961); 107 Cong. Rec. 1677, 1679 (1961) (Message of Pres. Kennedy); 107 Cong. Rec. 3759-60 (1961) (Remarks of Cong. Mills). This amendment then was a response to a particular need and was fashioned primarily to aid "employable" fathers who *involuntarily* lost jobs by operation of recessionary business cycles, and who needed financial assistance to maintain a family while actively seeking to re-enter the work force. 107 Cong. Rec. 3767-3768 (1961) (Remarks of Cong. Byrnes); S.

[10] The only reference to or support for eligibility for striking employees during the 1934-5 hearings came in a Statement of the Communist Party before the House Labor Committee. The Communist Party asked for "guarantees" to prevent "the withholding of benefits from workers who have gone on strike." House Labor Subcommittee Hearings 1217, reprinted, *Statutory History of the United States: Income Security* 138 (Yale, 1970). There is no language in the Social Security Act of 1935 or as amended which even hints such "guarantees" were enacted or approved.

Rep. No. 165, 87th Cong., 1st Sess. 3 (1961); H.R. Rep. No. 1414, 87th Cong., 2d Sess. 15 (1962). [11]

Eligibility for employees like Mr. Francis whose financial need arises solely out of their support for a strike, is wholly inconsistent with this legislative purpose because it was involuntary unemployment which totally separated the worker from the job market which Congress sought to provide for. As one commentator has summarized:

> strikers clearly do not fit within any of the categories of unemployed persons whom Congress attempted to assist through the AFDC-U[F] program. A striker's unemployment is not directly caused by recession or inability to learn and hold a job. Rather, its results from the use of economic pressure to break a dead lock in collective bargaining.

Note, *Welfare for Strikers*, 39 U. Chi. L. Rev. 79, 90 (1972).

This incongruity is emphasized when one considers other 1968 amendments to the AFDC and AFDC-UF programs. Congress declared its commitment to a federal welfare program designed to reduce dependency on welfare and to transform the unemployed into employable and productive citizens by creating incentives to improve employability. H.R. Rep. No. 544,

[11] Unlike the sudden impact of impersonal economic forces, the decision to strike is one within the control of each individual worker whether or not a union member. Unions can not lawfully impose discipline or secure the discharge of non-members who elect to work during a strike. *NLRB* v. *Hershey Foods Corp.*, 513 F.2d 1083, 1085-87 (9th Cir. 1975); *Local 649, Boilermakers* v. *NLRB*, 466 F.2d 343, 344-45 (D.C. Cir. 1972), *cert. denied*, 410 U.S. 976 (1973); *NLRB* v. *Phila. Iron Wks.*, 211 F.2d 937, 941 (3d Cir. 1954). And union members can avoid fiscal penalties by simply resigning union membership prior to the strike, or prior to the time the employee desires to return to work. *Lodge 405, Machinists* v. *NLRB*, 412 U.S. 84, 88 (1973); *NLRB* v. *Granite State Jt. Bd., supra*, 409 U.S. at 217. Moreover, resignation does not necessarily result in forfeiture of union financed funds. Contract and property rights preserve individual interests in such funds. See Note, *Union Power To Discipline Members Who Resign*, 86 Harv. L. Rev. 1536, 1568-69n. 187 (1973).

90th Cong., 1st Sess. 3, 16, 107 (1967); S. Rep. No. 744, 90th Cong., 1st Sess. 4, 145-46 (1967); H.R. Conf. Rep. No. 1030, 90th Cong., 1st Sess. 58-9 (1967). [12] Thus the Federal Work Incentive Program (WIN), requiring benefit applicants to seek work or be amenable to job training in order to establish and maintain eligibility, was incorporated into the AFDC-UF statute. 81 Stat. 877, 42 U.S.C. § 606(b)(2) (1968). Since employees temporarily engaged in a work stoppage during a labor dispute possess marketable job skills and a current job by virtue of their continuing employment relationship with their employer, these amendments are an incontrovertible indication that the type of unemployment which concerned Congress in these amendments was poles apart from temporary work loss associated with a labor dispute.

When Congress has authorized federal funds to be paid employees engaged in a labor dispute, it has done so expressly. In 1938 Congress removed railroad workers from the state unemployment compensation provisions and in section 204(a-2)(iii) (45 U.S.C. § 354(a-2)(iii)) of the Railroad Unemployment Insurance Act created a federal reserve of payments to these workers while on strike *if* their strike was not contrary to the Railway Labor Act [13] or union rules. But this legislative change was not made because of concern for the financial needs of these employees during labor disputes, but to create an economic incentive for these workers to support peaceful

[12] Congress further provided that the failure of an employable individual to conform to the work requirement would terminate benefits if an offer of employment or enrollment in a training program was rejected "without good cause". 42 U.S.C. §§ 602 (a)(19)(F), 607 (b)(1)(B), 607 (b)(2)(C)(i). See also *Philbrook* v. *Glodgett, supra*, 421 U.S. at 710-11.

Consistent with these amendments, the Secretary of HEW limited a bona fide refusal to accept employment to substandard wages, physical inability to perform the job and unsafe working conditions. Appendix B, Regulation Section 233.100 Title 45, C.F.R. Ch. II, Sec. 233.100. The Secretary apparently found no basis in the absence of supportive legislative intent to include being involved in a labor dispute as another valid reason to refuse available employment.

[13] 44 Stat. 577 (1926), 45 U.S.C. §§ 151-163.

resolution of disputes and to discourage resort to "wildcat" strikes in one industry vital to the public interest. *Bhd. of Railway Clerks* v. *Railroad Retirement Bd.*, 239 F.2d 37, 42-3 (D.C. Cir. 1956). And in the Food Stamp Act [14] Congress condoned receipt of federal money to purchase food stamps for persons engaged in a labor dispute. As originally enacted, this Act was not generally understood by Congress to provide eligibility for strikers. See 116 Cong. Rec. 42,015 (1970) (Remarks of Cong. Abbitt). Nor was it enacted for this purpose. One purpose was to aid farmers by creating another outlet for farm surplus "to strengthen our agricultural economy." Section 1(7 U.S.C. § 2011). However, in the absence of express language disqualifying strikers, an increasingly large number of striking employees were able to obtain benefits. In 1968, 1970 and 1973 Congress rejected efforts in the House and Senate to disqualify strikers from receiving benefits. These rejections were not, however, premised upon the merits of whether food stamps for strikers was consistent with federal welfare policy. Instead rejection of the proposed striker disqualification arose from a political trade-off between proponents of farm subsidies and opponents of a specific striker disqualification. As Senator Humphrey stated: "I simply say to my colleagues, if you want a farm bill, you must vote down (the striker disqualification) amendment (to the Food Stamp Act) . . . ." 119 Cong. Rec. 26,909 (1973) (Remarks of Sen. Humphrey); see also 119 Cong. Rec. 26,910 (Remarks of Sen. Nelson); 114 Cong. Rec. 28,314 (1968), 116 Cong. Rec. 42,035 (1970). Thus, Congress has at least condoned and accepted limited subsistence federal aid to strikers in this legislation which is outside the purposes of the Social Security Act.

In light of these payment programs, it is reasonable to conclude that if Congress had intended similar eligibility in the AFDC-UF it likely would have done so expressly rather than through the term "unemployed"—a term wholly inapplicable to a worker engaged in a labor dispute. Cf. *Burns* v. *Alcala, supra*, 420 U.S. at 584. In sum, the limited purpose of the

[14] 78 Stat. 703 (1964), 7 U.S.C. §§ 2011, *et seq.*

AFDC-UF program itself demonstrates that Congress gave no thought to including in this program dependent children of fathers engaged in a temporary work stoppage. And thus Congress in 1968 conferred no authority upon HEW to define "unemployment" so as to enroll such fathers because their inclusion is beyond the objectives and purposes to be achieved by this legislation. Cf. *United States* v. *Bishop*, 412 U.S. 346, 356 (1973); *NLRB* v. *Lion Oil Co.*, 352 U.S. 282, 288-89 (1957). [15]

3. Federal Labor Laws Limit HEW's Discretion to Provide Optional Eligibility for Employed Workers

Congress has distinguished between those out of work and those holding jobs and has created different and separate means of aiding their economic welfare. As Judge Duniway stated in *Macias* v. *Finch, supra*, 324 U.S. F. Supp. at 1260:

> Congress by legislating as it has, has distinguished between the unemployed and the

[15] In light of this legislative history, the defeat of several legislative efforts since 1968 to specifically exclude strikers' coverage under the AFDC-UF program is not determinative evidence that Congress intended to authorize such eligibility. H.R. 6004, 92d Cong., 1st Sess. (1971) (not reported out of committee); amendment to H.R. 1, 92d Cong., 1st Sess., § 448, 1971 (defeated); S. Rep No. 92-1230, 92d Cong. 2d Sess. 108, 472-73 (1972) (amendment deleted before bill voted on the Senate floor). Rather, it is at least as plausible to infer that these amendments originated out of congressional awareness of erroneous interpretations of the purposes of this program, and therefore simply constitute an effort to clarify the original congressional intent. "It would be equally plausible to suppose that (the drafters) thought HEW had misinterpreted the Act and wanted to make the original intent clear". *Burns* v. *Alcala, supra*, 420 U.S. at 586 n.12.

The remarks of Congressman Mills (107 Cong. Rec. 3766) (1961)) that "it is possible" that states could use "their own funds" obtained from "general taxpayers funds" to support persons unemployed as a result of a labor dispute are not to the contrary. Whatever Mr. Mills may have thought in 1961 about eligibility under the experimental AFDC-UF program, the 1968 amendments, as shown above, superseded the states' authority to define unemployment and redefined unemployment so as to exclude those out of work solely due to a labor dispute.

underemployed, and has applied different solutions to the problems of each group.

As we have shown, *supra*, pp. 15-19, the Social Security Act provides no implication whatever as originally enacted in 1935 or as amended that Congress was concerned about the hardships to children of employees resulting from the exercise of economic weapons during bargaining disputes. The economic adversity, if any, suffered as a result of a labor dispute was not the type of misfortune which Congress intended to mitigate by direct federal financial assistance. Congress intended the AFDC-UF program to protect children and the nuclear family from the total employment disruption caused by the impersonal operation of recessionary business cycles.

For the "working man" (*Chemical Wkrs.* v. *Pittsburgh Glass*, 404 U.S. 157, 166 (1971)), it was Congress' judgment in 1935 that redressing the inequitable balance of bargaining power between employer and employee by protecting the wage earner's right to strike and bargain collectively would concurrently reduce industrial strife and improve wages. 29 U.S.C. §141.[16] See also *Anchor Motor Freight* v. *Hines*, 424 U.S. 554, 563 (1976) (federal labor laws seek to strengthen the bargaining position of the average worker in an industrial economy). Congress also sought "to aid the unprotected, unorganized and lowest paid of the nation's working population" (*Brooklyn*

[16] Section 1 of the NLRA, entitled "Findings and Policies" provides in pertinent part: The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

Bank v. *O'Neil*, 324 U.S. 697, 707n.18 (1945)) through the Fair Labor Standards Act.[17]

The *temporary* loss of wages resulting from the exercise of the federal right to strike is not sufficient to transform the self-sufficient breadwinner into a proper recipient of federal welfare benefit. This Court noted the difference between these separate federal systems for aiding the economic well being of two distinct groups of citizens in *Carleson* v. *Remillard*, *supra*. There, the Court's holding expressed through Mr. Justice Douglas that children of fathers away from the home on military service were eligible for federal AFDC benefits was based in significant part on the rationale that, unlike union represented employees in the private sector like Mr. Francis, personnel on active military service are without access to a union or to collective bargaining to assist the advancement of their economic circumstances. 406 U.S. at 603. Respect for and recognition of this legislative judgment also requires the conclusion that Congress did not intend HEW to define "unemployment" to permit optional AFDC-UF benefits for workers engaged in a labor dispute.

[17] Act of June 25, 1938 c 676, 52 Stat. 1060, 29 U.S.C. §§ 201 *et seq.* Section 2(a) and (b) provides:

(a) The Congress finds that the existence, in industries engaged in commerce or in the production of goods for commerce, of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers (1) causes commerce and the channels and instrumentalities of commerce to be used to spread and perpetuate such labor conditions among the workers of the several States; (2) burdens commerce and the free flow of goods in commerce; (3) constitutes an unfair method of competition in commerce; (4) leads to labor disputes burdening and obstructing commerce and the free flow of goods in commerce; and (5) interferes with the orderly and fair marketing of goods in commerce.

(b) It is declared to be the policy of this chapter, through the exercise by Congress of its power to regulate commerce among the several States and with foreign nations, to correct and as rapidly as practicable to eliminate the conditions above referred to in such industries without substantially curtailing employment or earning power.

Congress also legislated the distinction between "unemployment" and "underemployed" persons in the unemployment compensation provisions of the 1935 Social Security Act to harmonize these provisions with the currently enacted Wagner Act. [18]

In *California Dept. of Human Resources* v. *Java*, 402 U.S. 121, 130 (1971), the Court reviewed the legislative history of the unemployment compensation provisions of the 1935 Social Security Act (42 U.S.C. §§ 501-503) and stated: "The objective of Congress was to provide a substitute for wages lost during a period of unemployment not the fault of the employee." The type of unemployment subject to compensation was not that related in any way to labor disputes, but was limited like the later AFDC-UF program to workers who, during periods of economic stress, have their contract of employment completely and suddenly severed by the unpredictable operation of recessionary business cycles and the fluctuation of production demands. H.R. Doc. No. 81, 74th Cong., 1st Sess. 8 (1935); H. R. Rep. No. 615, 74th Cong., 1st Sess. 3, 7 (1935); S. Rep. No. 628, 74th Cong., 1st Sess. 11 (1935). The unemployment compensation program was one response to the Great Depression which caused unprecedented severance of employment relationships. "The problem had become national in area and dimensions. There was need of help from the nation if the people were not to starve." *Steward Mach. Co.* v. *Davis, supra,* 301 U.S. at 586 (per J. Cardozo). "Clearly the (Social Security Act) was intended to care for periods of economic stress when workers through no fault of their own, were unable to find employment." *Personal Finance Co.* v. *United States,* 86 F. Supp. 779, 786 (D. Dela. 1949). As the Federal Relief Administrator testified, unemployment compensation relief "covers a great many thousands of people who are thrown out of work suddenly." Hearings on H.R. 4120 before the House Comm. on Ways and Means, 74th Cong., 1st Sess. 214 (1935).

[18] The Wagner Act was signed into law by President Roosevelt on July 5, 1935; the Social Security Act became law on August 14, 1935.

Not only did Congress limit unemployment compensation to workers without jobs, but Congress also expressly imposed a mandatory duty of neutrality in labor disputes upon the participating states to assure these benefits would not adversely affect the collective bargaining scheme established in the concurrently enacted Wagner Act. In section 903(a)(5) of the Social Security Act (now the Federal Unemployment Tax Act, 26 U.S.C. §§ 3301-3308), Congress provided that out of work claimants could not be denied benefits if they refused to accept employment at a plant where a strike or lockout was in progress, or refused to work for wages and benefits below area standards, or declined to forego the federal right established just one month earlier to join a labor organization. [19]

The Social Security Board in its general advisory role, formulated in 1936 a model bill for adoption by the states which included these standards as well as a provision which specifically disqualified individuals whose unemployment "is due to a stoppage of work which exists because of a labor dispute at the factory, establishment or premises at which he is or was last employed." *Social Security Board, Draft Bills for State Unemployment Compensation of the Pooled Fund and Employer Reserve Account Types,* § 1(5) (1936). [20] This later provision is especially significant in light of the fact that the independent Social Security Board was presumably aware of

[19] This provision provides in *hace verba*:

Compensation shall not be denied in such State to any otherwise eligible individual for refusing to accept new work under any of the following conditions: (A) if the position offered is vacant due directly to a strike, lockout, or other labor disputes; (B) if the wages, hours, or other conditions of the work offered are substantially less favorable to the individual than those prevailing for similar work in the locality; (C) if as a condition of being employed the individual would be required to join a company union or to resign from or refrain from joining any bona fide labor organization. 26 U.S.C. § 3304 (a)(5).

[20] This provision was inapplicable to claimants who were not "directly interested in the labor dispute which caused the stoppage of work" or who were not members of a "grade or class of workers" employed at the premises immediately prior to the work stoppage. *Social Security Board, Id.*

the legislative history and background of the Social Security Act and undertook in its advisory role to follow the will of Congress. This provision read in a common sense fashion literally precludes the availablility of unemployment compensation to workers who stop work because of a labor dispute regardless of whether a strike or lockout occurs. This disqualification was essential to harmonize the unemployment compensation system with federal labor policy, to avoid large incursions into limited compensation funds, and to maintain state neutrality in labor disputes. See Manpower Admin. U.S. Dept. of Labor, Comparison of State Unemployment Ins. Laws 4-10 (3rd rev. ed. Sept. 1, 1973).

Of course, Congress allowed the states considerable latitude in fashioning unemployment compensation statutes. [21] But as the legislative history and the model bill of the Social Security Board make plain, local experimentation was limited to means of funding and methods for providing tax credits. S. Rep. No. 628, 74th Cong., 1st Sess. 13-14 (1935); 79 Cong. Rec. 5782 (1935) (Remarks of Sen. Wagner). The cardinal principle that benefits should not affect the newly established labor relations system was not subject to local reevaluation. As Mr. Justice Cardozo stated in *Steward Mach. Co.* v. *Davis, supra,* 301 U.S. at 594: "What (the states) may not do, if they would earn the credit, is to depart from those standards which in the judgment of Congress are to be ranked as fundamental."

To be sure Congress did not specifically ban the states from providing such availability, but in light of the contemporary Wagner Act, a specific direction of prohibition would have been superfluous. Moreover, this omission was natural because

[21] Some members of the Roosevelt Administration believed the role of the states in any unemployment compensation system had to be considerable in order to provide some financial assistance if any extensively regulated federal system was declared unconstitutional by the Supreme Court. Indeed, while Congress was considering the Social Security Act, the Supreme Court decreed the demise of the National Industrial Recovery Act. (48 Stat. 195 (1933)) in *Schechter Poultry Corp.* v. *United States,* 295 U.S. 495 (May 27, 1935). See also A. Schlesinger, *The Coming of the New Deal,* 305-6 (1958).

Congress was not, in 1935, legislating against a background of general state created labor dispute eligibility for unemployment compensation. Compare *Munn* v. *Illinois,* 94 U.S. 113 (1877). Prior to 1935 Wisconsin was the only state which had legislated an unemployment compensation system, but its operation was delayed and abandoned pending Congressional consideration of a federal system. See R. Hoar, *Wisconsin Unemployment Insurance* (1934); Larson and Murray, "The Development of Unemployment Insurance in the United States", 8 Vand. L. Rev. 181, 184-86 (1955). Since employees were not then eligible or actually receiving unemployment compensation benefits under state programs when they engaged a work stoppage, it was unnecessary for Congress specifically to proscribe such a disqualification.[22] And in 1970 Congress specifically reaffirmed

[22] This conclusion is not undermined by the failure of Congress in 1969 to enact a specific disqualification for striking employees proposed by President Nixon, or by Congressman Mills' views during debate on other proposed amendments that states could use their own funds to pay benefits to employees on strike. 115 Cong. Rec. 34,106 (1969) (Remarks of Cong. Mills). No such disqualification was needed because Congress simply reaffirmed, in the unemployment compensation amendments enacted in 1970, the original limited 1935 policy that compensation should only go to those actually unemployed as a result of economic stress. Mr. Mills' 1969 views about that 1935 policy are thus erroneous and because he was not a member of Congress until 1939, his views certainly don't reflect a general consensus that unemployment in the House and Senate should be provided to employees. See *United States* v. *Wise,* 370 U.S. 405, 414 (1962). Indeed Congress has not rendered all unemployed persons eligible for unemployment compensation. The 1969 amendments extended coverage to only 4.4 million of the 16.6 million jobs unprotected by compensation eligibility. S. Rep. No. 91-752, 91st Cong., 2d Sess. 3 (1970). In the absence of comprehensive coverage, the failure of Congress to enact an amendment to specifically exclude employees involved in a labor dispute from unemployment compensation supports the opposite inference, namely that Congress intended to clarify the original intent that such workers were barred from eligibility by the requirement that states observe strict neutrality in labor disputes. *Burns* v. *Alcala, supra,* 420 U.S. at 566.

that unemployment compensation was limited to victims of impersonal economic forces. The Senate Finance Committee stated:

> Over the years, the unemployment compensation program has provided a continuing income to millions of men and women in periods of unemployment. The program has also added a stability to national economy that has moderated, and on occasion perhaps even averted, economic recession.
>
> The committee believes that the disqualification provisions of State unemployment compensation laws should be devised so as to prevent benefit payments to those responsible for their own unemployment, without undermining the basic objective of the unemployment insurance system—to provide an income floor to those whose unemployment is beyond their control.

S. Rep. No. 91-752, 91st Cong., 2d Sess. 1, 24 (1970).

In sum Congress has consistently created two distinct systems to aid separate segments of the population, and has permitted an overlap only by express legislative directive. Since Congress has given no affirmative indication that AFDC-UF benefits should be given to employees participating in a labor dispute, the courts below erred in including Mr. Francis within the HEW definition of "unemployment". [23]

[23] *Ohio Bureau of Employment Services* v. *Hodary, probable jurisdiction noted,* ____ U.S. ____, 97 S. Ct. 53-4 (1976) (No. 75-1707) also presents issues directly related to unemployment compensation payment and the states' duty of neutrality during labor disputes. The Court may thus profitably hear argument in that and the instant case in tandem.

II. MARYLAND'S DISQUALIFICATION PROVISIONS PROPERLY DENY AFDC-UF BENEFITS TO STRIKING EMPLOYEES. BUT IMPROPERLY CONFER THESE BENEFITS UPON LOCKED OUT EMPLOYEES

A. Introduction

Maryland's unemployment compensation law disqualifies claimants whose work stoppage results from a strike but authorizes benefit eligibility if the work stoppage occurs as a result of lockout. See n.4, *infra.* Thus, locked out employees are eligible for AFDC-UF cash payments because they are eligible for unemployment compensation under Maryland's lockout exemption statute. Whether on strike or locked out employees are still engaged in a labor dispute and retain their protected status under the National Labor Relations Act. If the Court agrees that Congress did not intend workers participating in a labor dispute to shift any economic hardship resulting from the exercise of collective bargaining rights to the public through the AFDC-UF program, then Maryland's unemployment compensation regulations are valid with respect to the striker disqualification, but invalid with respect to the exception granted employees locked out by their employer during a labor dispute. This lockout exemption is invalid because it violates Maryland's federally imposed obligation of neutrality in labor disputes, and state eligibility standards under the AFDC-UF program must be consistent with federal standards. *E.g, Carleson* v. *Remillard, supra,* 406 U.S. at 600.

B. The Duty of Neutrality in Labor Disputes is Equally Applicable to All Work Stoppages Regardless of Cause

In 1932, Congress broadly defined a "labor dispute" in order to restrict federal court intervention in such disputes. Section 13(c) (29 U.S.C. § 113(c)) of the Norris-La Guardia

Act [24] defines this term to expressly include the collective bargaining dispute which led to Mr. Francis' work stoppage:

> any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee.

In Section 2(9) of the Wagner Act, Congress reenacted this broad definition [25], and decisions of this and other Courts reflect that this term has been given a broad interpretation. *E.g., NLRB* v. *Washington Aluminum Co.*, 370 U.S. 9, 15-16 (1962); *Sachs* v. *Plumbers, Local 481*, 454 F.2d 879, 883 (4th Cir. 1972) ("The mark of a labor dispute is the presence of economic adversaries"). Significantly, Congress specifically included a "lockout" as a "labor dispute" within the states duty of neutrality in the Social Security Act (26 U.S.C. § 3304 (a) (5) (A)), thereby declining to draw any distinction between a strike and a lockout. This is reasonable because a lockout, like a strike, is simply another manifestation of a labor dispute, which Congress has twice defined to include a collective bargaining dispute. Thus in either case the states must occupy a completely neutral position. *NLRB* v. *Wire Prods. Mfg. Corp.*, 484 F.2d 760, 765 (7th Cir. 1973). A lockout does not terminate the employer-employee relationship. "(A lockout) differs from a discharge in the same way that a strike differs from resigning or quiting work." The Restatement of Torts §

[24] Act of March 23, 1932 c. 90, 47 Stat. 70, 29 U.S.C. §§ 101 *et seq.*

[25] The term "labor dispute" includes any controversy concerning terms, tenure or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and employee. 29 U.S.C. § 152(9).

787 Comment a (1939). Just as Congress used a broad definition of labor dispute in the Norris-La Guardia Act to insulate such disputes from the federal judiciary, Congress incorporated this same definition into the Social Security Act to keep states from aiding either side in a labor dispute.

The American unemployment compensation system described *supra*, pp. 25-28, was borrowed from the British system established in 1911. Like our scheme the British objective was to provide " 'a substantial allowance to those whose unemployment results from industrial causes beyond the control of the individual.' " Beveridge, *The Past and Present of Unemployment Insurance* 7 (London 1930). And, as we have seen Congress in Section 903(a)(5) of the Act and the Social Security Board in the model bill described above also included the essential feature of the British system—a broad labor dispute disqualification provision. Thus, under the British system a striking employee is ineligible for unemployment compensation unless he is permanently replaced or his vacant job is totally eliminated. M. Hughes, *Principals Underlying Labor-Dispute Disqualifications* 26 (1946). And the English decisions are uniform in holding that a lockout is also a trade dispute which triggers the labor dispute disqualification provision. An illustrative opinion (Umpire Decision No. 5117, April 19, 1928 pp. 364-365) states:

> If the question had in this case been raised for the first time I should have had to decide for myself whether a stoppage of work brought about by a lockout at a factory at which there was not otherwise a dispute, but which was declared in support of one of the parties to a trade dispute at another factory, is a stoppage of work which is due to a trade dispute at the factory from which the employees are so locked out, but the question has already been decided by the Umpire in a number of cases, and I do not feel at liberty (whatever my own opinion unaided by the wisdom of any predecessor might have been) to

> depart from those decisions. In several cases on the Act of 1911 the Umpire in similar circumstances decided that the "lock-out in itself constitutes a trade dispute" or "extended the trade dispute" to the premises at which the lock-out was declared. This principle he applied in Decisions 336 and 1753 (Benefit, 1911 Act). 2170, 2239, 3793 (O.W.D.) and 437 among others.
>
> The construction put upon the Act of 1911 by the Umpire was well known at the time of the passing of the Act of 1920, and I must assume that, when reenacting in the Act of 1920 the trade dispute section of the Act of 1911, Parliament intended that the later Act should be construed in the same way that the earlier Act had been construed.

Both nations have imposed careful safeguards to limit unemployment payments to those out of work by excluding workers idled only by their participation in a labor dispute. Congress did not intend the states to have the option of providing either AFDC-UF or unemployment compensation to employees engaged in a labor dispute. Thus Maryland's regulations are invalid to the extent locked-out employees can receive either cash AFDC-UF benefits or unemployment compensation because they violate the federal standard of strict governmental neutrality during labor disputes and expand to AFDC-UF program beyond its limited purpose.

CONCLUSION

For the foregoing reasons the judgment of the Court of Appeals should be reversed.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

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v.

ROBERT FRANCIS, *et al., Respondents,*

AND

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, *Respondent-Intervenor.*

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

REPLY BRIEF FOR RESPONDENT-INTERVENOR

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REPLY BRIEF FOR RESPONDENT-INTERVENOR

In its Brief, Respondent Robert Francis ("Francis") ignores relevant legislative policy in describing the AFDC-UF welfare program, misconceives the burden of persuasion with respect to demonstrating benefit entitlement under this program, and blurs the statutory distinction which distinguishes striking employees from persons wholly without a job.

Each of these arguments requires response so that the Court can properly review the important welfare eligibility and agency rule-making issues raised in the instant case.

ARGUMENT

1. Francis' basic argument is that because employees who voluntarily quit their job or are fired for cause are in fact "unemployed", federal and state regulations which authorize denial of unemployment welfare for "unemployed" persons are *ipso facto* invalid. Whatever this argument's persuasive impact for discharged and voluntary quit claimants, Francis, as did the District Court (Jt. App. p. 85a), concedes (Br. 6) "some ambiguity" whether a striker is also "unemployed". Francis thus suggests its argument may not be applicable to striking employees, and, indeed, this apparent concession goes to the heart of this case.

The Chamber agrees with Petitioners (Opening Br. 29-30) that in resolving the legality of the HEW regulations with respect to AFDC-UF eligibility "it is reasonable to adopt a construction of 'unemployment' which is both consistent with the purposes of the AF DC-UF statute and general usage in labor relations matters, *viz.*, a striker is employed—not unemployed." The statutory origin for the accepted labor relations concept that a striker retains his job and his status as an employee throughout the strike period is found in §2 (3) of the National Labor Relations Act.[1] The Federal

[1] Section 2(3) provides in pertinent part:

> The term 'employee' . . . shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute . . . and who has not obtained any other regular and substantially equivalent employment . . . .

29 U.S.C. § 152(3).

Congress re-enacted this same definition of employee in the Labor-Management Reporting and Disclosure Act of 1959. See § 3(f), 29 U.S.C. § 402(f); *Brennan* v. *Independent Lift Truck Builders Union*, 490 F.2d 213, 217 (7th Cir. 1974) (discharged union member retains employee status within § 3(f) while discharge is contested before NLRB).

Bureau of Labor Statistics properly follows this legislative command by classifying workers involved in labor disputes as "employed persons". Handbook of Labor Statistics 1-2 (1970). And this statutory definition and Labor Department classification effect and limit the scope of HEW's discretion to define unemployment because:

> Frequently the entire scope of Congressional purpose calls for careful accommodation of one statutory scheme to another, and it is not too much to demand of an administrative body that it undertake this accommodation without excessive emphasis upon its immediate task.

Southern S. S. Co. v. *NLRB*, 316 U.S. 31, 47 (1942).

In the *Southern S. S. Co.* case, the Court held that the Board could not ignore federal Criminal Code provisions declaring resistance to lawful orders to be mutiny in ordering the reinstatment of discharged sailors who refused their captain's command to return to work. Similarly, in *Burlington Truck Lines* v. *United States*, 371 U.S. 156, 172 (1962), the Court cautioned the Interstate Commerce Commission that its broad discretion to issue cease and desist orders was circumscribed by "the possible effects of its decision on the functioning of the national labor relations policy" . . . because "[t]he policies of the Interstate Commerce Act and the labor act necessarily must be accommodated, one to the other." See also *McCulloch* v. *Sociedad Nacional*, 372 U.S. 10, 21 (1963) (Labor Board's broad grant of jurisdiction limited by international maritime law and international treaties).

The Chamber contends a similar accommodation between federal welfare and labor policies must be made

here.[2] There is no reason to believe Congress intended to modify or repeal this pre-existing federal definition of strikers as employees when in 1961 and 1968 it enacted and amended the AFDC-UF welfare program. There is nothing in the legislative history of the Social Security Act that justifies the conclusion that Congress intended to upset the balance of economic power between labor and management by granting striking employees federal welfare payments. Moreover, there is no positive repugnancy between welfare and labor policies because full effect to the purposes of each Act can be easily achieved by the reasonable and unavoidable conclusion that Congress distinctly left striking employees to private rather than public aid to alleviate any economic hardships occasioned by the exercise of the protected federal right to strike during collective bargaining. See *NLRB* v. *Textile Wkrs.;* 409 U.S. 213, 217 (1972). The judicial authority of this Court includes the accommodation of federal policies, and we believe as do Petitioners that resolution of instant case, to paraphrase *Burlington Truck Lines* v. *United States, supra,* must weigh the possible effects . . . on the functioning of the national labor relations policy."[3]

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[2] The Court has undertaken the task of accommodating the Sherman Antitrust Act with federal labor policy. *Connell Co.* v. *Plumbers, Local 100,* 421 U.S. 616, 626 (1975); *Mine Wkrs.* v. *Pennington,* 381 U.S. 657, 665 (1965); *Meat Cutters* v. *Jewel Tea,* 381 U.S. 676, 689 (1965).

[3] The Chamber does not contend here that federal labor policy is alone controlling of the portion of this case now before the Court. This is one of the arguments advanced in the Chamber's certiorari petition now pending before the Court (No. 75-1182). It is clear, however, because Mr. Francis is a striking employee that reference to federal labor law is unavoidable, as Petitioners also recognize, to give full content to the accepted concepts of unemployment which Congress reasonably can be said to have delegated to the HEW Secretary to define. We merely note here one case where the Ninth Circuit did hold the National Labor Relations Act to be paramount to the Social Security Act with respect to the definition of "employer." *NLRB* v. *Long Lake Lumber Co.,* 138 F.2d 363, 364-5 (1943). See also *Super Tire Engin'r Co.* v. *McCorkle,* 416 U.S. 115, 124 (1974).

2. Francis argues (Br. 21-23) that striking employees must be regarded as mandatorily eligible for AFDC-UF cash payments because of "an absence of a clear intent to disqualify". Francis also concurs (Br. 23) with the District Court's observation (Jt. App. p. 84a) that "the legislative history of 42 U.S.C. § 607 throws little light on the subject (of AFDC-UF payments to those out of work because of labor disputes)".

Like Petitioners (Opening Br. 11, 35) we contend that such a concession is determinative of this issue before the Court. Unless claimants can demonstrate clear, affirmative congressional support for mandatory or optional benefit entitlement, they are outside the class of intended beneficiaries and legislative silence is to be construed against eligibility. *Burns* v. *Alcala,* 420 U.S. 575, 580-85 (1975). There the Court expressly rejected the presumption of eligibility standard applied by the District Court and affirmed by the Fourth Circuit in the instant case. Thus, the burden is no longer on the state to show a clear intent to disqualify. Because the Congress did not intend to authorize either mandatory or optional eligibility for striking employees like Mr. Francis, the only HEW regulation which comports with the limited policy of the AFDC-

UF program is one which excludes such claimants from eligibility. Because the courts below applied a subsequently overruled standard of eligibility and erroneously concluded that HEW must provide for mandatory eligibility while acknowledging the absence of supporting legislative materials, the decision below, at least with respect to claimant Mr. Francis, must be reversed.[4]

3. Francis insists however (Br. 18) that Congress did not intend to disqualify all striking employees from the AFDC-UF program. The sole support for this contention is one statement during debate by Congressman Mills that "it is possible" states could use "their own funds" obtained from "general taxpayers funds" to support persons unemployed as a result of a labor dispute. 107 Cong. Rec. 3766 (1961) (Remarks of Cong. Mills). This statement offers no support for Francis' position and that of the courts below that eligibility for striking employees is mandatory. If Congress did in fact intend this eligibility to be optional, then the challenged HEW and Maryland regulations properly reflect this legislative intent, and the judgment below must be reversed.

We believe, however, that the views of Congressman Mills, which Francis concedes (Br. 18) are "not conclusive" even as support for optional eligibility, were totally supplanted by the 1968 amendments to the

[4] We do not concur with Petitioners' view that states retained some discretion to grant AFDC-UF benefits to striking employees; notwithstanding the 1968 amendments to the AFDC-UF program which withdrew from the states the authority to define "unemployment". Just as states cannot deny aid to persons who are actually unemployed, states cannot grant aid to persons who are outside the scope of the general scheme of this welfare program.

AFDC-UF program, which withdrew from the participating states the authority to define "unemployment". "An important purpose of the 1968 amendments was to eliminate the variations in state definitions of unemployment . . . ." *Philbrook* v. *Glodgett*, 421 U.S. 707, 719 (1975). And Congress further limited the scope of the AFDC-UF program by requiring claimants to have "a substantial connection with the work force". H.R. Rep. No. 544, 90th Cong., 1st Sess., 17 (1967). Congress wanted to limit the program to fathers who were actually unemployed "for at least 30 days prior to receipt of such aid", to those who had at least 6 quarters of work in any 13 calendar-quarter period "within one year prior to the application", and to those who were qualified for or received unemployment compensation Section 407 (b)(1)(A) and (c)(i)(ii). Since striking employees are not actually unemployed, retain their jobs during the strike and have a current and continuing attachment to the work force, the Chamber submits this class of claimants is plainly outside the limitations engrafted by these amendments. Congress withdrew definitional discretion from the states to prevent and preclude benefits from going to claimants with a job and with an existing and continuing employer-employee relationships. Thus Congressman Mills's views in 1961 on the scope of the states discretion to define unemployment, no longer represents the legislative judgment of the Congress.

Moreover it is also clear that the policies served by the AFDC-UF program limit HEW's delegated authority to define "unemployment". Congress fashioned this program to give federal aid to fathers of dependent children who had been thrown out of work and who needed public funds to support a family while actively

seeking to reenter the work force. As Congressman Byrnes stated the AFDC program "should also include children who are in need, where the breadwinner is able to work, wants to work, and is just unable to get (work)." 107 Cong. Rec. 3768 (1961) (Remarks of Cong. Byrnes). A striking employee is not this type of breadwinner. He is able to obtain a job, indeed, he currently has one with the struck employer. Unlike the job applicant, a striking employee has elected not to work, albeit temporarily, in order to pressure his employer to accede to his collective bargainig demands.

In addition, most striking employees are not looking for a new job and few can obtain even temporary positions because most employers are aware that when the strike concludes strikers are likely to return to jobs where seniority has accumulated pension and other benefits. Nor do most striking employees need training in order to return to their jobs. They necessarily possess marketable and essential skills by virtue of their current employment. It is plain then that these 1968 amendments relating to improving employability and requiring registration for available work further describe a Congressional resolve to limit the AFDC-UF program to those who actually need assistance to reenter the active work force. That Mr. Francis can register for new work and be "available" for a training program does not alter the fact that he already is a part of the active work force.

This is clear when one attempts, as does Francis (Br. 17), to analogize the status of a striker to an employee who totally severs the employment relationship by quitting his job. There is no necessity to determine "prior attachment" to the work force because,

unlike the worker without a job, a striking employee has never left the active work force. The striking employee is fully able and qualified to perform the work he has elected to leave temporarily unperformed, and thus, unlike a person seeking a job, has no need for job training. Because a striking employee retains his job and is likely to return to it rather than seek a new position when the strike concludes, he does not need or desire the assistance of required registration on an out-of-work list to find an employer who will make him a job offer. In light of these expressions of the type of "unemployment" which Congress sought to provide for, the Chamber submits not only that Francis has failed to demonstrate an affirmative Congressional indication of eligibility for striking employees, but also that Congress intended that such claimants whose need arises solely as a consequence of the free exercise of the federal right to strike (29 U.S.C. § 163) to be excluded from the scope of the AFDC-UF program.

4. Francis also argues (Br. 15 n. 13) that strikers may be regarded as unemployed for purposes of inclusion within the AFDC-UF program because state unemployment programs treat workers involved in a labor dispute as "unemployed." But this Great Depression program, like the later AFDC-UF program, was designed to grant a tax supported substitute for lost wages to those without jobs and wages until a new job could be secured. *California Dept. of Human Resources* v. *Java*, 402 U.S. 121, 130 (1971). It is true that the term "unemployment" has been applied to persons "out of work" because of a labor dispute, but this loose language is of no significance because most states, like Maryland, disqualify striking employees out of a pro-

per regard for the state's duty of neutrality in labor disputes. Whether striking employees are disqualified because they are not actually unemployed or because such aid would enlist public monies on the employees' side during a strike, the operative effect is the same. Accordingly, Francis' analogy to state unemployment compensation laws does not advance its claim that Congress intended *mandatory* AFDC-UF eligibilty for persons engaged in a strike against their employer.

In § 407(b)(2)(C)(ii) of the Social Security Act Congress provided that receipt of unemployment compensation terminates AFDC welfare benefits. Congress thus recognized in the permanent as well as the experimental AFDC-UC program [5] that federal welfare benefits, like unemployment compensation should be available to workers victimized by recessionary business cycles beyond their control. In *Philbrook* v. *Glodgett, supra,* the Court held that persons actually unemployed could elect benefits from either scheme without first exhausting unemployment compensation benefits. 421 U.S. at 715-19. This decision recognizes the similar purposes behind these separate payment schemes, and thus it is proper to construe the scope of the term "unemployed" the same way for both benefit programs. Thus, by a parity of reasoning to the analysis set forth above, striking employees are also excluded from receipt of unemployment compensation because they are not actually unemployed, and those state laws to the contrary violate the federally imposed duty of neutrality in labor disputes.

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[5] "At present needy families in which need is occasioned by unemployment are not eligible for any type of 'federal' assistance . . . ." S. Rep. No. 165, 87th Cong., 1st Sess., 1 (1961).

CONCLUSION

For the reasons stated above as well as those contained in the Chamber's Opening Brief, the judgment of the Court of Appeals should be reversed and the injunction issued by the District Court should be vacated.

Respectfully submitted,

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